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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. _____

RICHARD TAXE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FLAX and ROSENFELD

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OPINION BELOW

The opinion of the Court of Appeals is not yet reported. A copy of the opinion is attached in our Appendix (App. A).

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Sound Recording Amendment to the Federal Copyright Act is unconstitutional on its face or as applied.
2. Whether the Closing Argument of the Prosecutor deprived petitioner of a fair trial.
3. Whether the district court improperly failed to conduct a hearing testing the validity of a search warrant.

STATEMENT

On July 24, 1974, after a six week jury trial in the United States District Court for the Central District of California, petitioner was convicted of (misdemeanor) conspiracy (18 U.S.C. § 371), twenty substantive misdemeanor violations of the new Federal Copyright Act (17 U.S.C. §§ 1, 101(e), 104) (R.1),^{1/} and five counts of mail fraud (18 U.S.C. § 1341). Petitioner was also charged in three counts alleging

^{1/} "R." is a reference to the Clerk's Record; "Tr." refers to the Court Reporter's transcript.

interstate transportation of stolen and converted property, i.e., illegally duplicated sounds contained on sound recordings (18 U.S.C. § 2314). The district court acquitted petitioner of these charges during the prosecution's case-in-chief (Tr. 2240).^{2/} Petitioner was sentenced to four years imprisonment and fined \$26,000.00; he was also ordered to pay the entire costs of prosecution, purportedly pursuant to 28 U.S.C. § 1918(b) (R. 1496; R. 3944-3945).^{3/} Petitioner is

^{2/} Petitioner's co-defendants, his brother Ronald Taxe, one Rick Ward and Geraldine Gonzales, were each convicted of (misdemeanor) conspiracy and twenty substantive violations of the Copyright Act and were sentenced to one year/\$21,000, nine months/\$2,000 and six months/\$2,000 respectively (R. 1486-1490). These individuals were not charged in any felony count.

Another defendant, Jerry Merton, charged in the identical counts as these three defendants, was acquitted by the court at the close of the government's case-in-chief (Tr. 2704).

^{3/} On appeal, petitioner attacked the validity of the imposition of costs; the Court of Appeals concluded that costs were improperly imposed and vacated and remanded that specific portion of the judgment (App. A. 11-12)

presently at liberty upon a corporate surety bond of \$50,000.00.

This conviction arises from the first criminal prosecution brought by the government pursuant to the 1971 Sound Recording Amendment to the Federal Copyright Act (Public Law 91-140) which has reached the appellate stage of review. Each count in the indictment is predicated upon an interpretation of the Act.^{4/}

The conspiracy charge (Count 1) alleged that petitioner and his co-defendants conspired willfully and for profit to infringe upon copyrighted sound recordings (R. 1030-1032). The objects of the conspiracy were alleged in part to be, by the manufacture and sale of so-called "pirated" copies of sound recordings, consisting primarily of reproductions of current hit albums (R. 1029). The conspiracy count further alleged that petitioner established both real and fictitious

^{4/} In the court's "pre-instruction" to the jury on fixation, the court informed the jury, "All counts of this Indictment involve a construction and effect of [the Sound Recording] Amendment." (Tr. 1498).

businesses in order to further the conspiracy (R. 1029). The other defendants are alleged to have assisted petitioner in one way or another by performing a number of acts allegedly in furtherance of the conspiracy (R. 1029-1030).

Counts Two through Twenty-one charged that petitioner willfully and for profit infringed the copyrights of twenty specified sound recordings, each of which consists of an entire record or tape "album" (i.e., each such sound recording contains approximately eight to twelve individual musical selections). Counts Two through Twenty-one further alleged that each of said sound recordings was first fixed and published with requisite notice of copyright after February 15, 1972.

Counts Twenty-one through Twenty-six, inclusive, charged only petitioner with violations of the Federal Mail Fraud Statute (18 U.S.C. § 1341). These counts alleged that petitioner made certain false and fraudulent representations which included the following: that the eight-track stereo tapes sold by petitioner's company complied with Federal

law; that the tapes were "simulated" by Sound 8 (a company of petitioner's) singers and musicians; that petitioner's company is not a manufacturer and that the owner of petitioner's company is Richard Taylor (R. 1035-1042).

Petitioner admitted at trial that under his direction, stereo records or eight-track stereo tape recordings manufactured by major record companies were purchased on the open market from retail outlets (Tr. 3085). It was stipulated that, with specially adapted electronic tape equipment, the commercially acquired records or tapes were electronically changed in one or more of the following respects: the recording speed was increased or decreased; reverberation and/or echo was introduced; certain portions of the musical sounds were eliminated or reduced in volume; and additional sounds were produced by electronic instrumentation (Tr. 2645-2664, 3291; Government's Exs. 603-628, Defense Ex. K.). The eight-track stereo tapes created under petitioner's direction were thereafter sold and distributed to the public. The

uncontroverted evidence at trial also indicated that the organization was involved in many unquestionably legal music oriented products.

Although the Government contended in its pre-trial pleadings that the tapes produced by petitioner were identical to those produced by the major record companies,^{5/} the evidence did not support this contention. Thus, the Government was forced to revise its position during the trial and contend that even though petitioner caused certain changes to be made in the tapes, the provisions of the Sound Recording Amendment were nevertheless violated so long as "there was a

^{5/} The Government, in its opposition to petitioner's Motion to Dismiss the Indictment, stated flatly: "With respect to Counts One through Twenty-One, the Government will establish at trial that [petitioner's] works are exact copies of copyrighted sound recordings and that they contain no speed changes, tonal variations or other alterations." (Emphasis in original.) [R. 751.] This statement by the Government no doubt served to mislead the court in connection with its ruling on petitioner's Motion to Dismiss the Indictment.

duplication of the original sound recording." (Tr. 860-862).

During the course of the trial, the court recognized that substantial problems existed insofar as the Government's ability to prove fixation subsequent to February 15, 1972, with respect to all of the sound recordings (i.e., complete albums) named or alleged in all counts of the Indictment (Tr. 2026, 2217, 2230-2238). Accordingly, the court directed the Government to choose one particular musical selection from each such sound recording, and to rely solely upon that selection in the prosecution of its case (Tr. 2231, 2237). The Government thereupon selected twenty-six musical selections (i.e., particular "songs") upon which it relied in the proof of all counts of the Indictment (Tr. 2281-2292; Exs. 603-628 [Stipulations]).

Petitioner posited the defense of lack of willfulness. In his defense, he presented inter alia the testimony of an attorney who advised him that the contemplated action would not run afoul of the law (See, infra, fn. 13.

ARGUMENT

I

THE SOUND RECORDING AMENDMENT IS UNCONSTITUTIONAL FACIALLY AND AS APPLIED IN THE INSTANT CASE

A. Facial Invalidity

This Court should grant review because the interpretation of the Sound Recording Act is a question of great importance.

In 1971, Congress enacted the Sound Recording Amendment to the Federal Copyright Act. This Amendment which became effective February 15, 1972 sought to grant copyright protection to sound recordings.^{6/} Although the lyrics

^{6/} Section 3 of Public Law 92-140 (the Amendment), which was added as a note to Section 1(f) of Title 17, reads in pertinent part:

" ... The provisions of Title 17, United States Code [this Title], as amended by Section 1 of this Act [amending this Section and Sections 5, 19, 20 and 26 of this Title], shall apply only to sound recordings fixed, published, and copyrighted on or after the effective date of this Act and before January 1, 1975, and
(continued)

of particular songs have long been subject to copyright protection, the actual physical embodiment of the performance of such lyrics as contained on a disc or tape, together with accompanying music was not subject to copyright protection until the effective date of the Sound Recording Amendment.

In our view, taken together, §§ 1(f), 26, 101(e) and 104 are so vague as to fail to fairly apprise a reader of the conduct purportedly proscribed. Indeed, a fair reading of the statutory phraseology seductively points to the conclusion that petitioner's conduct was not within the statutory proscription.

It is a fundamental proposition that in order to withstand constitutional scrutiny, an Act of Congress must provide fair notice or warning. Legislatures are required to set reasonably clear guidelines in order to prevent

6/ (continued)

nothing in Title 17, United States Code, as amended by Section 1 of this Act, shall be applied retroactively or be construed as affecting in any way any rights with respect to sound recordings fixed before the effective date of this Act."

"arbitrary and discriminatory enforcement," Smith v. Grogan, 415 U.S. 556, (1974). As earlier put by this Court in Grayned v. City of Rockford, 408 U.S. 102, 108-109 (1972):

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application ...

(Footnotes omitted). [Emphasis added.]

Set against this standard, an analysis of the appropriate sections reveals that they cannot pass constitutional muster.

Section 1(f) of the Copyright Act provides:

§1. Exclusive Rights as to Copyrighted Works.

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

* * *

(f) To reproduce and distribute to the public by sale or other transfer or ownership, or by rental, lease, or lending, reproductions of the copyrighted work if it be a sound recording: Provided, That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or

indirectly recaptures the actual sounds fixed in the recording; Provided further, That this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording; or to reproductions made by transmitting organizations exclusively for their own use. [Emphasis added.]^{7/}

The Copyright Certificates for sound recordings and Applications for same, prepared by the Registrar of Copyrights, follows 37 C.F.R. § 202.15a(b) and Copyright Office Circular No. 56 by defining the crucial concept of "fixation" as follows:

"A series of sounds constituting a sound recording is 'fixed' when that complete series is first produced on a final master recording that is later reproduced in published

^{7/} As observed in n. 6, the Amendment "shall apply only to sound recordings, fixed, published and copyrighted on and after the effective date of this Act."

copies." (For example, see Ex. 1.)
(Emphasis added.)

Section 26 of the Copyright Act provides in pertinent part:

"Section 26. Terms defined

* * *

For the purposes of this section and sections 10, 11, 13, 14, 21, 101, 106, 109, 209, 215, but not for any other purpose, a reproduction of a work described in subsection 5(n) shall be considered to be a copy thereof. 'Sound recordings' are works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture. 'Reproductions of sound recordings' are material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device, and include the 'parts of

instruments serving to reproduce mechanically the musical work,' 'mechanical reproductions,' and 'interchangeable parts, such as discs or tapes for use in mechanical music-producing machines' referred to in §§ 1(e) and 101(e) of this title." (Emphasis added.)

Section 101(e) of the Copyright Act provides in relevant part:

"Section 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * *

(e) Interchangeable parts for use in mechanical music-producing machines.--Interchangeable parts, such as discs or tapes for use in mechanical music-producing machines adapted to reproduce copyrighted musical works, shall be considered copies of the copyrighted musical works which they serve to reproduce

mechanically for the purposes of this § 101 and §§ 106 and 109 of this title, and the unauthorized manufacture, use, or sale of such interchangeable parts shall constitute an infringement of the copyrighted work rendering the infringer liable in accordance with all provisions of this title dealing with infringements of copyright and, in a case of willful infringement for profit, to criminal prosecution pursuant to § 104 of this title. . ." (Emphasis added.)

Finally, Section 104 provides in relevant part:

"104. Willful infringement for profit.

Any person who willfully and for profit shall infringe any copyright secured by this title, or who shall knowingly and willfully aid or abet such infringement, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment for not exceeding

one year or by a fine of not less than \$100 nor more than \$1,000, or both, in the discretion of the court: . . ." (Emphasis added.)

A close reading of the above-quoted provisions of the Sound Recording Amendment shows that, at best, it is a very complex amalgamation of terms both common and uncommon, not only to the ordinary layman, but to many practicing attorneys as well. Moreover, although § 104 appears to forthrightly state that "Any person who willfully and for profit shall infringe any copyright secured by this title . . . shall be guilty of a misdemeanor . . ." (emphasis added), it is readily apparent that conduct which does not give rise to civil liability for copyrighted infringement cannot constitute criminal conduct under § 104. United States v. Wells, 176 F.Supp. 630 (S.D. Texas 1959). Therefore, the entire body of law concerning civil copyright infringement must be consulted on the issue of criminal as well as civil liability. See M. Nimmer, Nimmer on Copyright, § 162 (1973).

It is important at the outset to note that other than through this case, not one court has yet had occasion to construe the various individual terms and phrases used in the Amendment. It is thus devoid of any narrowing interpretations that might render such terms and phrases less vague. Smith v. Groquen, supra.^{8/}

Section 1(f) of the Copyright Statute attempts to establish the extent of copyright protection for sound recordings. The copyright proprietor is granted the right to "reproduce" and distribute to the public "reproductions" of the copyrighted work if it be a sound recording, provided that this exclusive right to reproduce the sound recording is limited to the right to "duplicate" the sound recording in a tangible form that directly or indirectly recaptures

^{8/} Our research has revealed only one case which considered the constitutionality of the Sound Recording Act. See Shaab v. Kleindienst, 345 F.Supp. 489 (D.C.D.C. 1972). In a one page per curiam opinion, the court rejected a vagueness contention without supportive reasoning.

the actual sounds fixed in the recordings. (Emphasis added.) Section 26 defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture," and defines "reproductions of sound recordings" as "material objects in which sounds other than those accompanying a motion picture are fixed by any method now known or later developed,..." (Emphasis added.)

Although the right to "reproduce" the sound recording is limited to the right to "duplicate" the recording, nowhere in the Amendment is the word "duplicate" defined. Does to "duplicate" the sound recording mean to recapture in tangible form the exact "series of musical, spoken, or other sounds"? Thus, will a slight variation of the "series of musical, spoken, or other sounds" not be considered a "duplicate," so as not to infringe the copyright owner's copyright? Is it a "duplicate" if a series of musical, spoken or other sounds found in a sound recording is "fixed" in material objects at a

speed faster or slower (and thus at a different pitch or tone) than the series of musical, spoken or other sounds in the "original" sound recording? Likewise, is it a "duplicate" of the first sound recording if portions of the "original" sounds are removed, and/or new sounds are added? Neither the statute nor the case law provides answers to these crucial questions.

Moreover, the Government and the Court^{9/} would apparently urge that the second proviso of 17 U.S.C. § 1(f), which provides that the exclusive right to reproduce the sound recording "does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recordings," clearly means that "so long as the allegedly infringing work is a product of re-recording, rather than an independent production, an infringement

^{9/} Government's Opposition to Defendants' Motion to Dismiss Indictment (R. 751); Court's Memorandum Opinion Re Jury Instructions (Tr. 1470-1471).

exists."^{10/} In short, they argue that the second proviso makes it perfectly clear that the only product permitted by the statute is a separate sound production by separate (or the original) artists.

In our view the position adapted by the Government and the court is patent error. Moreover, the crucial issue, for present purposes, is whether the actual language of the statute gives fair notice of the conduct intended to be prohibited. Smith v. Goguen, supra; Grayned v. City of Rockford, supra. Nowhere in the statute, or in any case law, is the phrase "independent fixation of other sounds" defined. Nowhere does it state that the phrase means independent production by other, or the same, artists. Moreover, the ambiguity of the language in the second proviso permits great latitude as to its intended meaning.

Is it not reasonable for an independent reader to conclude that he would be "making or duplicating another sound recording" that is an "independent fixation

^{10/} Court's Memorandum Opinion Re Jury Instructions (App. B).

of other sounds" which "imitates or simulates those in the copyrighted sound recording," were he to use the copyrighted recording as a base, add new sounds to the recording and/or change the sounds in some respect, and make an "independent fixation" of the modified recording by re-recording it onto a new master? Indeed, it is important to observe that the Government itself took the position that a simple re-recording can constitute an "independent fixation." The Government contended that "independent fixation" clearly meant a new production using the same or new artists insofar as infringement was concerned, yet the government nevertheless also argued that a simple re-recording (i.e., an electrical transference without using any musical artists) of pre-February 15, 1972 songs onto a new master, if that re-recording took place on or after February 15, 1972, constituted a new (i.e., "independent") fixation of those songs entitled to copyright protection.^{11/} It is incredible that the

^{11/} THE COURT: Well, where does that get you? Basically, what is your
(Continued)

Government could in good faith contend that "independent fixation" clearly means "new artists" when infringement is concerned, yet on the other hand attempt to invoke the protection of the statute by contending that a simple

^{11/} (continued)

position? Just synthesize it for me, please. That if you have a recorded tape consisting of four old songs that are just re-recorded on this master, and five new ones, that the whole tape is protected by the new statute?

MR. BROWN: Yes, sir.

* * *

THE COURT: So that the recording companies can avail themselves of the protection of the statute by putting out the same old [i.e., first fixed prior to February 15, 1972] tape in a different order, is that it?

MR. BROWN: That is correct, your Honor. Picking ten songs, for example, that were recorded at an earlier time, placing them all in ..." [Tr. 2222-2223] [Emphasis added].

The court subsequently and properly ruled, of course, that only those songs for the first time fixed on a master subsequent to February 15, 1972 were entitled to protection under the Sound Recording Amendment [Tr. 2230-2232].

electrical rerecording of pre-February 15, 1972 material onto a new master constitutes a "new fixation" and all the while argue that the statute is not unconstitutionally vague. Since even the Government simultaneously took inconsistent views of the concept of "fixation"--it certainly is reasonable to conclude that a member of the public would not know, from reading the statute, the nature of the conduct sought to be prohibited.

Further, § 26 of the Copyright Act, together with the Copyright Certificate for a sound recording and the Application for Copyright in a sound recording, prepared by the Registrar of Copyrights, greatly adds to the confusion. Section 26 defines "sound recordings" as "works that result from the fixation of a series of musical, spoken, or other sounds,..." (Emphasis added.) The Copyright Certificate and Application for Copyright follow 37 CFR § 202.15a(b) and Copyright Office Circular No. 56 by defining "fixation" in the following terms: "A series of sounds constituting

a sound recording is "fixed" when that complete series is first produced on a final master recording that is later reproduced in published copies."

(Emphasis added.) Since "fixation" is ambiguously defined in terms of a complete "series" of sounds, it is not unreasonable to conclude that so long as the "series" is changed, by such things as speed changes to change the pitch of the sounds, filtering to remove certain sounds, the addition of reverberation, and the addition of new musical sounds by the use of electronic instrumentation,^{12/} there technically is a new "series of sounds" that, when placed on a new master, would therefore not be considered a "duplication" of the copyrighted sound recording. Moreover, is it also not unreasonable to conclude that, given the ambiguities in the

^{12/} It was stipulated at trial that both Government and defense expert witnesses found that all of the tapes produced by petitioner contained one or more of such changes, even though such tapes were derived from the tapes produced by the major record companies. (Tr. 2645-2664; 3291; Government's Exs. 603 628; Defense Ex. K.)

second proviso to Section 1(f), the re-recording of this new "series of sounds" onto a new master would constitute a permissible "independent fixation of other sounds"? Certainly, neither the statute itself nor the case law provides a ready answer. Further, it is clear that this is precisely the conduct that petitioner's attorney thought the statute permitted, and he so advised petitioner.^{13/}

^{13/} The attorney, George Siegel, testified at trial:

"Yes sir. I told Mr. Taxe that in my opinion, after the research that I had done, that provided that he made the changes that he -- that he made one or more of the changes that he had suggested that he was going to make, that I believed that he would not be violating any law, or would not be violating the February 15, 1972 law. I told him that.

* * *

"Q. Do you recall what, in substance, you told him with respect to the question of what he could or couldn't do by way of a new fixation?

A. Yes. I told him that his responsibilities, as far as I understood it, was to create a new series of
(continued)

Based on the above complex, seductive and highly ambiguous language of the

^{13/} (continued)

sounds. He said, 'What do you mean by a "new series of sounds"?'

I said, 'As I understand the law, a new series of sounds is just what you would ordinarily understand to be the dictionary definition of that. If the sound waves that come out are different, if what you have done has created in fact a new sound, you haven't violated the law.'

Q. Did you discuss with him the term 'duplicate' as found in Section 1(f) of the new law?

A. Yes, I did, very specifically.

Q. Would you please tell us what you said to him and what he said to you concerning this subject.

A. Yes. I said, 'Mr. Taxe, you have to understand that the law is perfectly clear on one subject, and that is the copyright holder reserves and has the exclusive right to make an exact duplicate of his sound recording. And so you must be extremely careful that you do not make exact duplicates of sound recordings, because then you will be violating the law.'

And he understood that, and he told me he had no intention of doing that.

On the other hand, I told him further
(continued)

Sound Recording Amendment, it is impossible to imagine how the Amendment can

13/ (continued)

that if what he was doing, what he was going to do was to create, electronically or otherwise, a new series of sounds that, as far as I understood the law, that would not run afoul of it.

[Emphasis added.] [Tr. 2719-2721.]

On cross-examination by the prosecutor, petitioner stated:

BY MR. BROWN:

Q. Were you familiar -- it's on page 2 of that particular document which you had in your desk -- that it states what the rights of the copyright proprietor were?

A. Okay. Could you tell me where you are reading?

Q. The top line. It says, 'That the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recordings.'

A. That is correct.

Q. And it further goes on to limit this right in the copyright owner, doesn't it?

A. Yes, sir, it does.

Q. It says, '... That this right does not extend to the making or

(continued)

28.

be held to "give the person of ordinary intelligence a reasonable opportunity to

13/ (continued)

duplication of another sound recording that is an independent fixation ...'

You claimed to the FBI to have a great deal of knowledge regarding the copyright law, didn't you?

A. Well, I am not a lawyer, but I think I understand it.

Q. An 'independent fixation' is a separate series of sounds contained on a master recording, is it not?

A. An 'independent fixation,' to me, means that if you take whatever method you want to use and you make a master tape using your own ingenuity, or whatever -- in my thinking what we did was make an independent fixation of sounds on a new master tape that was unlike the original; and it couldn't be duplicated very easily, either. So what we did, we took the original sounds, the sounds that came out of that machine were different, and put them on another master tape; whereby, in my opinion, we made an independent fixation which was unlike the original. And I think it complied with the law. I really do.

Q. Mr. Taxe, there is nothing at all anywhere in that copyright law, or anywhere in that Goldstein decision, that says anything, is there, that the only thing that a copyright owner was

(continued)

29.

know what is prohibited." Grayned v. City of Rockford, supra. Moreover, with

13/ (continued)

protected from, or that he had a right in, was the exact item produced?

A. It sure looks like it to me. And I could show you where.

THE COURT: Did I understand, sir, that you interpreted the new statute as first giving property rights to the fellow who made the first copyrighted post-'72 sound recording?

THE WITNESS: Yes, sir.

THE COURT: So those sounds belong to him.

THE WITNESS: Yes, they do, those particular sounds.

THE COURT: And if you took his sounds, you felt it was all right if you added or subtracted some, or changed some, is that it?

THE WITNESS: Well, if I added or subtracted, that might be a little different. If I changed them -- in other words, if you just speed up a recording, every sound on that recording is changed. The pitch is changed. So if I took his actual sounds, I don't think I would be complying with the law.

THE COURT: But if you took his sounds and speeded them up somewhat, you thought you were all right?

(continued)

respect to the term "duplicate" as used in the first proviso to § 1 (f), at the very best it might be argued that the term inferentially incorporates the complex doctrine of "substantial similarity," which has been applied in other areas of the copyright law in order to determine if an infringing copy of the original item has been made. Professor Nimmer has commented upon the difficulties inherent in the doctrine:

Just as copying is an essential element of infringement, so substantial similarity between the plaintiff's and defendant's works is an essential element of copying. Yet, the determination of the extent of similarity which will constitute a substantial and hence infringing similarity presents one of the most difficult questions in copyright law, and one which is the least susceptible of helpful generalization...

13/ (continued)

THE WITNESS: I really did.

THE COURT: Very well. Proceed.
[Tr. 3204-3207] [Emphasis added.]

The problem, then, is one of line drawing. Somewhere between the one extreme of no similarity lies the line marking off the boundaries of 'substantial similarity.' Judge Learned Hand has said that this line 'wherever it is drawn, will seem arbitrary and that the test for infringement of a copyright is of necessity vague...' Nimmer, supra, § 143.1 (1973) (Emphasis added) (footnotes omitted).

Professor Nimmer goes on to discuss the concept of "substantial similarity" in a lengthy section of his treatise (Nimmer, § 143). The ultimate conclusion to be drawn from his treatise, as well as the cases cited herein, is that findings of infringement must necessarily be made on an ad hoc basis (See Nimmer, § 143.11.)

It is interesting to note that the trial judge, in his Memorandum Opinion re Jury Instructions, implies that the doctrine of substantial similarity is only to be used in those cases wherein the actual act of "copying" is in issue.

(App. B) He further found that since petitioner freely admitted that he re-recorded the copyrighted works with the addition of various changes, there was no longer any question as to whether "copying" had taken place, and thus held that the doctrine of substantial similarity was not applicable in the present case. The Court's analysis is completely misplaced in that even though there was an admission of using the copyrighted work in the manufacture of the tapes at issue, the above discussed language from Nimmer clearly indicates that the doctrine of substantial similarity is still vital in determining whether the extent of copying involved is an infringement.

Thus, even if the extremely ambiguous language of the Sound Recording Amendment with respect to the concept of "duplication" of sound recordings is said to incorporate the doctrine of "substantial similarity" so as to help define when an infringing "duplication" has occurred, it is apparent that the statute, as well as the case law, gives

no advance notice of what will be considered to be within the realm of infringing works. As discussed above, a person who utilizes a copyrighted sound recording in making a new recording therefore may or may not be an infringer, depending upon the extent and nature of his use of the copyrighted sounds. Few will argue that he cannot make some use of the "series of musical, spoken, or other sounds" comprising the copyrighted sound recording without infringing that copyright, just as a novelist is permitted to make some use of prior copyrighted works without infringing such works. The question is one of degree; in some circumstances he will be held not to have "duplicated" the copyrighted sound recording even though he made some use of the copyrighted sounds.

Further evidence of constitutional infirmity, and at least as important as the vagueness inherent in the term "duplicate," is the obvious ambiguity inherent in the second proviso of § 1(f). As noted above, even the

Government has simultaneously taken completely inconsistent positions with respect to the concept of what constitutes an "independent fixation." It certainly is no less reasonable to assume that other readers of the statute would be confused by its meaning. Moreover, the statutory definition of "sound recordings" as a "series of . . . sounds" (17 U.S.C. § 26), together with the definition of "fixation" set forth in the Certificate of Copyright, which defines fixation in terms of "a complete series of sounds," certainly leaves room for an interpretation to the effect that if the "complete series" is somehow changed (i.e., by speed changes, filtering of sounds, addition of new sounds, etc.) and placed on a new master, it will then constitute a new (i.e., independent) fixation of a different series of sounds.

Since it is virtually impossible to determine in advance, with any degree of certainty whatsoever, the exact nature of the types of activities that might be held to infringe the copyright owner's sound recording copyright, the

statute on its face must be held to be void for vagueness. Very simple, the statute fails to meet all applicable notice requirements of the Due Process Clause, and fails to set standards for the fair and non-arbitrary enforcement of the criminal provisions of the Copyright Act; it must therefore be held to be unconstitutional. While these ambiguities might be found tolerable in a civil infringement proceeding, there clearly is no room for such gross imprecision in a criminal action where one's very liberty is at stake. Smith v. Goguen, supra; Grayned v. City of Rockford, supra. As stated by the court in Smith v. Goguen, in quoting from Conally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127:

A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.
415 U.S. at 574, n. 8.

Moreover, given that petitioner in fact made various changes to the copyrighted sound recordings in the rerecording of such recordings, the Sound Recording Amendment must also be held to be void for vagueness as applied in the instant case. In Smith v. Goguen, this Court, in considering a flag desecration statute, held:

"The language at issue is void for vagueness as applied to Goguen because it subjected him to criminal liability under a standard so indefinite that police, court and jury were free to react to nothing more than their own preferences for treatment of the flag." 415 U.S. 578, 94 S.Ct. 1250.

Similarly, in the present case the police, court and jury, as well as the general public, are left an incredibly wide discretion in determining what shall be considered an infringing "duplication" of the sound recording copyright, what shall be considered an "independent fixation," and what shall be considered a new "complete series of

sounds," among other things. The Sound Recording Amendment is thus rendered fatally defective at least insofar as it purports to attach criminal penalties to the act of "infringement," and on that ground alone the petition should be granted and the conviction reversed.

Moreover, the district court committed serious error when it effectively instructed a verdict and withdrew from the jury's determination a matter within its exclusive province, by instructing the jury that "independent fixation" expressly excluded re-recording even with changes (App. B). The circuit court agreed that the trial court misstated the law, but held the error cured by a subsequent inclusion of a comparison test which told the jury to find no infringement if the final product was no longer recognizable as the same performance originally recorded. (App. A).

The Ninth Circuit's opinion misses the point. The district court concluded that a rerecording remains an infringement notwithstanding changes made by the rerecorder "unless his final

product is no longer recognizable as the same performance." (emphasis added.)

This instruction is entirely incorrect. Since 17 U.S.C. § 26 defines a sound recording as "a series of sounds," the ultimate issue is not whether the performance is recognizable as being the same, but rather whether the "series of sounds" is a duplicate or at least substantially similar to the copyrighted series of sounds. It is obvious that whereas the "performance" might be recognized as being similar, the changes made to the tapes might well render the series of sounds not substantially similar to the original.

In any event, this Court incorrectly assumed that the jury was permitted a comparison test. This is a totally unrealistic view of the record. The court's instruction made it obvious that rerecording with changes was an infringement and thus removed the issue from the jury. Moreover, the jury could not compare sounds, for certainly no recording equipment was taken to the jury room. The jury heard only three

of the allegedly illegal tapes during the trial.

Moreover, the prosecutor's closing argument made it clear to the jury that the Court had removed the issue (Tr. 3800):

It appears to be a legal tape, but it is not. And there is no question. They aren't even raising it anymore. They don't even make a defense about it. It's an illegal tape. It's an infringing tape. His Honor's instructions will make that clear.

This Court is entitled to review the record in a practical manner to determine the true issues left open for jury consideration. See, generally, Ashe v. Swenson, 397 U.S. 436, 444 (1970). In this case, the court effectively directed a judgment on infringement.

B. Invalidity, As Applied

As demonstrated above, the Sound Recording Amendment is unconstitutionally vague in that it fails to give fair

notice of the conduct sought to be prohibited thereby. Moreover, even if it be held that the statute somehow gives notice of the conduct proscribed, it is nevertheless unconstitutionally vague in that it fails, as applied by the Registrar of Copyrights, to give fair notice of the sound recording material that is sought to be protected.

During the midst of the Government's case-in-chief, the court ruled, as a matter of law, that a recording of a song first fixed prior to February 15, 1972, and rerecorded either alone or with other songs after February 15, 1972, is not copyrightable. Thus, the court held:

First, a recording of a tune fixed in some master before February 15, 1972, and rerecorded or repeated in a master with other tunes after February 15, 1972, is not copyrightable. It was in the public domain in the sense that there was no copyrightability before February 15, 1972, and it remains in the public domain and it is not made copyrightable

because it is put in a new master with other tunes.

Second, a new master consisting of several tunes or songs is not to be viewed as a unit or single thing as to its copyrightability. If any separate song in a new master was not fixed on any master before February 15, 1972, that separate song is copyrightable, the Certificate of Copyright is prima facie evidence of a valid copyright of it. (R. 2230). (Emphasis added.)

It is thus clear from the court's ruling, and from a reading of the Sound Recording Amendment, that only individual tunes recorded and fixed after February 15, 1972 are copyrightable.

However, a review of the Copyright Certificates offered as exhibits at trial by the Government indicates that the Registrar of Copyrights has taken a totally different position, and has purported to provide copyright protection to entire record or tape albums, despite the fact that several tunes on

the album or tape do not constitute "new matter."^{14/} Thus, for example,

14/ That the Government was in complete agreement with the Registrar of Copyrights on this issue, at least until the time of the court's ruling as described above, is made clear by a review of the Reporter's Transcript at pages 2222-2226, wherein the Government counsel argued to the court that an entire album was subject to copyright protection even if all of the songs contained thereon were first fixed prior to February 15, 1972, so long as said songs were rerecorded onto a new master subsequent to February 15, 1972. For example, immediately prior to the court's ruling on fixation, Mr. Brown stated:

THE COURT: Let me ask you if you recognize a possible doctrine of copyrightability of part of a tape? Or does the whole tape stand and fall as a unit in terms of validity of copyright?

MR. BROWN: I believe, your Honor, that it's been our position, as we have reflected in our papers since the inception of the case, that the item stands on its own face. It's capable of being infringed whether it has one or more songs. It cannot be partially infringed. The whole item is infringed. In other words, ... (Tr. 2224-2225).

on Government's Exhibit 1, under paragraph 6, bearing the heading, "New Matter in This Sound Recording," it is indicated that on Side A, Band 1 of the ABC record album entitled "Tie a Yellow Ribbon Around the Old Oak Tree" is not or may not be new matter fixed after February 15, 1972. Likewise, numerous other Copyright Certificates introduced into evidence indicate that at least one or more "bands" (i.e., songs or tunes) on new albums were or may have been recorded prior to February 15, 1972, and thus are not copyrightable.

(For example, see Exs. 7,9,13,16,23,26, 33,35,37,42,47,50,51,52,54,55,56, and 59.) Furthermore, numerous exhibits demonstrate that some albums were purportedly copyrightable despite the fact that they may have contained no new tunes fixed after February 15, 1972.

(See, for example, Exs. 2,3,4,5,6,8,10, 11,12,14,15,17,20,21,22,24,25,27,28,29, 30,31,32,34,36,38,39,40,41,43,44,45,46, 48,53,57,58, and 60.)

Similarly, fourteen of the Certificates with respect to the 26 songs or

tunes which were ultimately at issue in the case below^{15/} reveal that certain bands are not new matter,^{16/} while the remaining twelve certificates reveal no "new matter" in the recording.^{17/}

Given the fact that the Sound Recording Amendment on its face applies only to recordings first fixed after February 15, 1972, as well as the ruling of the court referred to above, and the plain meaning of the Statute, it is apparent that the Registrar of Copyrights has applied the Sound Recording Amendment in an unconstitutional manner. In

^{15/} See Exhibits 603-628 (Stipulations re Sound Experts) for the names of the particular songs relied upon by the Government. The Copyright Certificates admitted into evidence with respect to same are Government's Exhibits 5,8,10, 11,13,20,24,35,39,45,52,56,63,87,93,97, 116,143,152,153,158,196,199,233,239.

^{16/} For example, see Government Exhibit Number 63 (re Count 11).

^{17/} For example, see Government Exhibit Number 196 (re Count 19). The obvious ambiguity in the certificates, as well as the court's error in instructing the jury that the certificates are prima facie evidence of date of fixation, is discussed in infra.

short, the Registrar has applied the Amendment in violation of petitioner's right to due process of law under the Fifth Amendment to the Constitution, in that petitioner, or anyone else for that matter, has not been provided with fair notice as to which tunes have been properly copyrighted, and which have not.

As discussed in the preceding section, it is a basic tenet of the criminal law that a statute, both on its face and as applied, must give fair notice of that which is prohibited. Thus, in Rabe v. Washington, 405 U.S. 313, 92 S.Ct. 993 (1972), the Court observed:

To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. 405 U.S. at 315.

In the instant case, the Registrar of Copyrights, in applying and interpreting the Sound Recording Amendment, clearly failed to give the requisite

notice under the Fifth Amendment, as to which songs were protected by copyright protection and which were not. Petitioner was thus deprived of the necessary fair warning. Even if the statute on its face is held to be sufficiently precise and to give the requisite notice that only songs first fixed after February, 15, 1972 are protected, the enlargement of that statute by the Registrar of Copyrights should be held to be violative of petitioner's Fifth Amendment rights in that the Copyright Certificates, as well as the copyright notices on the tape albums allegedly infringed, fail to give fair warning of which tunes or songs are properly copyrighted and which are not.

In an analogous situation, this Court has held that a statute which, on its face, was definite and precise, was nevertheless unconstitutionally enlarged by judicial construction, and applied to a defendant in violation of his due process rights. Bouie v. City of Columbia, 378 U.S. 347 (1964). In Bouie, the Court observed that:

There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.

If this view is valid in the case of a judicial construction which adds a 'clarifying gloss' to a vague statute, id., at 73, making it narrower or more definite than its language indicates, it must be a fortiori so where the construction unexpectedly broadens a statute which, on its face, had been definite and precise. Indeed, an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates, precisely like an ex post facto law, such as Article I, § 10, of the Constitution forbids. (378 U.S. 352, 353.)

Those sections of the Sound Recording Amendment which have been unconstitutionally enlarged are §§ 1, 10, 19 and

20 of Title 17, United States Code.^{18/}
A reading of these sections would appear

^{18/} Section 1 states, in a note appended thereto, that the provisions of the Sound Recording Amendment "shall apply only to sound recordings fixed, published, and copyrighted on and after the effective date of this act ..."

Section 10 provides in relevant part:

Any person entitled thereto by this Title, may secure copyrights for his work by publication thereof with the Notice of Copyright required by this Title; and such notice shall be affixed to each copy thereof, published or offered for sale in the United States by authority of the Copyright proprietor ...

Section 19 provides in pertinent part:

The Notice of Copyright required by § 10 ... in the case of reproduction of [sound recordings] ... shall consist of the symbol '(the letter P in a circle)', the year of first publication of the sound recording, and the name of the owner of copyright in the sound recording, or an abbreviation by which the name can be recognized, or a generally known alternative designation of the owner: Provided, that if the producer of the sound recording is named on the labels or containers of

(continued)

to indicate that Congress contemplated that an appropriate copyright notice would be affixed to each song or tune first fixed after February 15, 1972, so as to indicate that "such notice shall be affixed to each copy thereof . . .," while § 20 provides that "the notice of copyright shall be applied . . . on the surface or on the label or container in such manner and location as to give reasonable notice of the claim of copyright." However, an examination of the exhibits offered by the Government indicates that no such notice was given. In all instances, applicants for copyright protection merely sought, and were

18/ (continued)

the reproduction, and if no other name appears in conjunction with the notice, his name shall be considered a part of the notice.

Section 20 of Title 17 provides:

Notice of Copyright shall be applied, in the case of . . . a sound recording on the surface of reproductions thereof or on the label or container in such manner and location as to give reasonable notice of the claim of copyright.

granted, the right to place the letter P in a circle on the cover of the entire album or tape, despite the fact that one or more songs were or may not have been copyrightable. Thus, the Registrar of Copyrights permitted, and the applicant took advantage of and obtained, copyright protection for sound recordings that were or may have been unprotectedible.

That the above is the case, is borne out not only by examination of the exhibits introduced by the Government, but also by a review of the Indictment, which alleges in Count One a conspiracy to willfully infringe, without authorization, upon copyrighted sound recordings, while Counts Two through Twenty-One provide in each instance that Taxe and the other co-conspirators, "did willfully and for profit, infringe the copyright of sound recordings specified in each of the counts listed below." [Tr. 1033.] Thereafter follows a list in Counts Two through Twenty-One, which under the heading "Sound Recording," merely lists the title and copyright

registration number of an entire tape album, rather than individual copyrighted songs. Hence, there can be no doubt that the Government's charge was not that petitioner willfully infringed the copyright of a specified copyrighted song or tune, but that the infringement was of an entire tape album. As has been demonstrated above, in virtually all of the albums at issue, the certificates indicate that some tunes were contained which were not or may not have been copyrightable, depending upon whether they were first created and fixed prior to February 15, 1972. Even the trial court concluded as a matter of law that "a new master, consisting of several tunes or songs, is not to be viewed as a unit or single thing as to its copyrightability." [Tr. 2230.]

Thereafter, in order to conform to the court's ruling, the Government proceeded to try the case based upon a theory different from that set forth in the Indictment and different from that which it had urged throughout trial. See Stirone v. United States, 361 U.S. 212, (1960).

Finally, the Registrar of Copyrights' action in granting a Copyright Certificate to an entire tape album, as opposed to limiting his action to copyrightable songs contained therein, constitutes conduct which is unconstitutionally overbroad in that it purportedly seeks to protect sound recordings that are not protectible. That petitioner has been directly affected by the Government's overbroad application of the statute in question has been demonstrated by a review of the exhibits offered at trial, and by a reading of the indictment, which purports to make criminal not merely the willful infringement of copyrighted songs, but the infringement of allegedly copyrighted tape albums. This Court has been vigilant in striking down statutes which, either on their face, or as construed and applied are patently overbroad and in violation of constitutional rights. Dombrowski v. Pfister, 380 U.S. 479 (1965); United States v. Robet, 389 U.S. 258 (1967). The petition for writ of

certiorari should be granted in order to fully vindicate the First Amendment and Fifth Amendment rights herein involved.

II

THE CLOSING ARGUMENT OF THE PROSECUTOR DEPRIVED PETITIONER OF A FAIR TRIAL

In Berger v. United States, 295 U.S. 78 (1935), this Court recognized the insidious impact that an improper prosecutorial closing argument could have on the right to a fair trial. In recent days federal appellate courts have too often slipped into the convenient tool of rejecting attacks based on closing argument by invocation of the harmless error doctrine. This diminution of fair trial guarantees requires the current attention of this Court. As we argue infra, the instant case poses a closing argument that is of textbook quality for improper argument. In an effort to secure a conviction, the prosecutor engaged in an argument that no prosecutor could have believed to be proper. Failure to reverse under circumstances such as present here, adversely affects the whole tone of our system. When federal courts sanction such arguments, prosecutors will continue

to abuse discretion in their closing arguments armed with the subtle knowledge that their misconduct will be validated on appeal.

Moreover, to sanction the specific misconduct which occurred here has far-reaching consequences that transcend this individual case.

In the instant case, the Ninth Circuit did not print the contested portions of the prosecutor's argument. In our view, the prosecutor's argument was so outrageous that it could not be published and validated. It seems inconceivable that a court would not punish the government prosecutor in the only meaningful way; the only means to adequately enforce petitioner's right to be free from this type of misconduct is to afford him a new and fair trial.^{19/} It is important

^{19/} Recently, in reversing a conviction for misconduct in closing argument, Judge Bazelon wisely observed,

There is, after all, every reason to believe that reversal will have a greater impact than a reprimand followed by affirmance. In this area, unlike the realm of police misconduct addressed by the Fourth

(Continued)

for this Court to establish parameters for assessing claims of prosecutorial misconduct on appeal.^{20/} The record in

^{19/} (continued)

Amendment exclusionary rule, the burden of reversal falls directly on the one responsible for the misconduct. [United States v. Freeman, 514 F.2d 1314, 1312, n. 45 (D.C. Cir. 1975)]

^{20/} As observed in United States v. Freeman, supra, 514 F.2d at 1321:

"[W]e believe that the circumstances of this case warrant reiteration of the warning to prosecutors delivered recently in United States v. Bell [506 F.2d 207 (1974)]: 'It may be that the day is near when reversal instead of admonition may become a necessary prophylactic tool to insure that prosecutorial arguments hew to the law.' Except in cases of abuse with strong potential for harm to the defendant, the custom of courts in responding to instances of prosecutorial misconduct by prosecutors has been to issue a verbal reprimand and affirm under the harmless error rule. Despite these verbal slaps-on-the-wrist, prosecutorial misconduct continues to provide 'one of the most frequent contentions of defendants on appeal.' Our experience thus suggests that courts must begin to take prophylactic considerations together with probable

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the instant case reveals a hard fought jury trial in which the issue of willfulness, i.e., criminal intent, was by no means overwhelming. In his effort to obtain these convictions, "Government counsel virtually threw discrimination to the wind," Wagner v. United States, 263 F.2d 877, 883 (5th Cir. 1959). He engaged in an argument that included gross improprieties that no prosecutor could believe to be proper. Inter alia, the prosecutor (1) commented on the failure to voluntarily consent to a search by the F.B.I. As we discuss below, this comment was constitutionally impermissible. Moreover, there was absolutely no evidence adduced at trial to support his assertion; (2) attempted to prove willfulness by arguing petitioner's purported efforts to obstruct justice for which he was relying on a conversation not in evidence; (3) denigrated the role of the defense counsel, by arguing that (a) cooperation and a consistent defense among defense counsel is

20/ (continued)

prejudice to defendant in deciding whether to reverse. We have no need to rely on such considerations in this case, as we have found reversal to be warranted on a traditional analysis.

evidence of conspiracy, (b) that one defendant paying all defendants' attorney's fees was evidence of conspiracy, (c) that counsel were themselves engaged in misconduct, and (4) engaged in derogatory and inflammatory characterizations of petitioner.

It is manifest that the Ninth Circuit was troubled by the prosecutor's closing argument. In our view, the Court seriously denied justice by speculating that the patently impermissible closing argument could not have affected the determination of guilt. It thus concluded that the argument could not have had the effect for which it was clearly calculated. This record is not the normal record which reaches the Court with counsel challenging misconduct of the prosecutor in closing argument. The argument in the instant case was totally indefensible. The misconduct was not isolated and infrequent. It was deliberate, intentional and calculated to inflame, prejudice and mislead. It was more than simple overreaching.

In the instant case the prosecutor

did not sit smugly secure in the knowledge that he had produced "overwhelming" evidence of guilt. Instead, the record reflects a serious concern by the prosecutor that he had not produced a case which would assure a conviction.

A. Comment Upon Failure to Consent to a Search by the F.B.I.

In his effort to prove wrongful intent, the prosecutor argued that petitioner was attempting to evade F.B.I. surveillance of his activities, prior to arrest. He argued to the jury (Tr. 3663-3664):

Next we look at the truck research.

Does that indicate to you someone acting in good faith? He drove in a clandestine way at 11:00 at night -- his entire inventory of tapes, 80,000, or a portion of his inventory. The defendant Richard Taxe and the defendant Ronald Taxe drove their two trucks, being followed by the F.B.I. They split as if by prearrangement, and joined

again. Did not consent to the search of the trucks. The FBI went in the trucks and found 80,000 Gault tapes in the trucks.

If they had nothing to hide, why did they keep driving? Why didn't they stop? Why didn't they consent to the F.B.I. looking inside their trucks immediately? Because they knew they were in violation of the law. That's why.

Then later, the prosecutor reiterated to the jury (Tr. 3682-3683):

During the night of January 22, 1974, Mr. Taxe, along with his brother Richard Taxe, drove a truck, in which they separated as if by design, and later reunited; kept the F.B.I. on a long search throughout the City of Los Angeles before they were finally apprehended, and did not voluntarily consent to the search of those trucks. Those trucks contained 80,000 Gault tapes; 20,000 of which were copyright protective sound recordings.

At this stage of our constitutional history, it is incredible to believe that any prosecutor would deem it permissible to comment on the exercise of a right protected by the Constitution. The Constitution forbids such comment. The error is compounded by the fact that there was no evidence whatsoever adduced at trial to support the prosecutor's assertion. Apparently, the prosecutor was relying upon facts adduced at the hearing on the motion to suppress (Tr. 181-235). This lack of evidence, thus, becomes the threshold issue. The only evidence heard by the jury concerned the fact that trucks driven by petitioner and Ronald Taxe were searched on January 22, 1974, and that tapes were seized (Tr. 1573). There was no evidence whatsoever concerning whether petitioner had consented to the search.^{21/} By his comment the prosecutor improperly necessarily communicated to the jury that he

^{21/} Indeed, the prosecutor could not introduce into evidence the fact of failure to consent to a search by the F.B.I.

personally knew facts outside the record which proved the petitioner's guilt.

The assertion of facts outside the record by the prosecutor is assuredly condemned. See ABA Standards Relating to the Prosecution and The Defense Function (Approved Draft, 1971 Standard 5.9).

In the instant case, the assertion of extraneous evidence created a dual vice -- first, it amounted to a personal assurance by the prosecutor that there was indeed evidence of which the jury was unaware that pointed to the guilt of petitioner, and secondly, it created an unfair inference that petitioner had in fact refused to consent without allowing him an opportunity to explain the reason for lack of consent.

The introduction, in closing argument, of unproven evidence is error of significant magnitude. Here, the unproven evidence involves a comment upon the exercise of a right protected by the constitution; the error rises to constitutional proportions.

Throughout our jurisprudential

history, it has been a necessary concomitant to a constitutional right, that no penalty be attached to its exercise. If one may be penalized for its exercise, then there is effectively no constitutional right at all. United States v. Jackson, 390 U.S. 570 (1968); Griffin v. California, 380 U.S. 609 (1965); Cf. Wilson v. United States, 149 U.S. 60 (1893).

The underpinning of Griffin is that in order to avoid a deminution of constitutional guarantees, no penalty can be imposed for the exercise of the protected right. A prosecutor is not free to make the assertion of a constitutional right costly to the accused, as the prosecutor assuredly did here. See also Doty v. United States, 416 F.2d 887 (10th Cir. 1969); Grunewald v. United States, 353 U.S. 391 (1957); Doyle v. Ohio, ___ U.S. ___ (1976); Fowle v. United States, 410 F.2d 48 (9th Cir. 1969).

While Griffin and its progeny involve specifically the assertion of a Fifth Amendment right, the underlying rationale is much broader. The Fifth Amendment bears no greater weight on our

constitutional scale. In our hierarchy of constitutional values, the Fourth Amendment has been entitled to commensurate protection with the Fifth. For constitutional purposes, the meaningful question is whether the accused is being penalized for the assertion of a constitutional right. The resolution of the constitutional question does not turn upon which particular constitutional guarantee is involved. Cf. United States v. Jackson, 390 U.S. 570 (1968).

To avoid reducing the exercise of a "hollow mockery," Slochower v. Board of Education, 350 U.S. 55, 557-558 (1956), the choice to exercise must "remain free, open and unfettered and without fear, threats or penalty." Pruett v. Texas, 468 F.2d 51 (5th Cir. 1972) (credit for time served during pendency of appeal; See also North Carolina v. Pearce, 395 U.S. 711 (1963).

Nor can it be persuasively argued that the error was cured by the attempted curative instruction given by the Court. At the conclusion of the government's argument the defense moved for a mistrial

based in part upon the prosecutor's comment upon petitioner's assertion of his Fourth Amendment rights (Tr. 3687, 3690-3691). The court indicated that it would instruct the jury that no adverse inference could be drawn from declination to consent (Tr. 3692). The defense objected to any such instruction being given because it "would merely highlight the problem already created" (Tr. 3693). Thereafter, the court did give an instruction.^{22/} This instruction by the court was totally insufficient to cure the error of the prosecutor. It only served to again highlight the prosecutor's argument. Moreover, it assumed facts in evidence which did not exist; as demonstrated

^{22/} The Court instructed (Tr. 3693-3694):

Ladies and Gentlemen of the jury; one item came up in argument this morning that I want to give you an instruction about.

When asked to give consent to the search of a vehicle by a law enforcement officer, one is not obligated to consent to give his consent to such a search; and no adverse inference of any kind may be drawn from any person declining to consent to search when asked to do so.

previously, there was no evidence of lack of consent adduced at trial.

The most important aspect, however, is that the jury could not possibly disregard this kind of comment. The prosecutor's comment that a person with nothing to hide would consent to a search has tremendous logical and probative force. That is precisely why the prosecutor made the comment and precisely why he should be penalized for his misconduct. The notion that the jurors could possibly compartmentalize their minds and disregard this sanguinary comment would be purely unmitigated fiction. Bruton v. United States, 391 U.S. 123 (1968). Moreover, a determination that a curative instruction is sufficient sets an undertone which allows prosecutors, without any deterrent whatsoever, to be less cautious in closing argument and to make totally unjustifiable comments of this nature, armed with the subtle knowledge that the appellate courts will allow their misconduct to be saved by the fiction of curative instructions.

B. Comment Upon Unproven
Obstruction of Justice

In his effort to prove willfulness by petitioner, the prosecutor vigorously cross-examined petitioner about conversations with one Frank Jones, a customer of petitioner's business. The prosecutor was attempting to establish that at the time when Jones came to California as a potential government witness, petitioner and co-defendant Rick Ward engaged in "solicitation for perjured testimony and obstruction of justice," (Tr. 1101). The prosecutor attempted to establish through petitioner that in the initial conversation with Jones, petitioner sought to obstruct justice. The prosecutor was totally unsuccessful in his effort to support this allegation through petitioner's own testimony.^{23/}

23/ The relevant parts of the cross-examination are reprinted as follows:

(3214)

* * *

Q. And at the time you handed him these tapes you were carrying on a conversation about what he should tell myself and the FBI

(Continued)

68.

Then, in an effort to corroborate that this purported attempted obstruction

23/ (Continued):

agents concerning his relationship with you and Gault Industries?

A. Would you like me to relay the conversation?

(3215)

THE COURT: You can answer that, sir.

THE WITNESS: Yes. We were carrying on a conversation. But I didn't tell him what he should tell.

BY MR. BROWN:

Q. And isn't it also a fact, Mr. Taxe, that during the course of this conversation you told Mr. Jones that if he would do something for you -- which we will get to in just a minute -- you would make him an exclusive distributor of Gault tapes, or SAM tapes, in the State of Tennessee?

A. It couldn't have been Gault tapes. Gault was out of business by then. But ...

Q. Make him the exclusive distributor of SAM tapes in the State of Tennessee?

A. I have to say no to that question, the way it was put.

THE COURT: Did you discuss an exclusive distributorship for tapes?
(Continued)

69.

of justice occurred, the government introduced into evidence and cross-examined

23/ (continued)

THE WITNESS: Yes, sir. But not if he would do something for me.

THE COURT: All right.

THE WITNESS: Yes, sir.

BY MR. BROWN:

Q. Didn't you tell him that what he would have to do for you would be to bring in those tapes that you handed him -- including the one -- and also tell both myself and the other persons who would be conducting the interview of him before his testimony, that what he received in the mail from Gault tapes were old 4-track tapes, blank plastic cartridges, and pre-February 15, 1972 tapes?

A. Absolutely incorrect.

Q. Didn't you further tell him that there would be no way that anyone could check on this because on the airbills it stated plastic cartridges were what was being sent through the mail from Los Angeles Airport by Gault Industries?

A. Absolutely not. I admitted to everybody that I shipped Gault tapes before this. Why should I tell him that? I did not say it. I would be happy to relate the conversation, if you would like it.

upon a transcript of a subsequent taped conversation between petitioner, Rick Ward and Frank Jones (Tr. 3216-3227).

By use of this transcript, the government sought to corroborate what the government implied that Jones related to them as to the content of his first conversation with petitioner. The government did not follow up; they did not call Jones as a witness. The only basis for the implication that petitioner had attempted to obstruct justice in his initial conversation with Jones was the implied assumptions contained within the prosecutor's improper questions. Then, incredibly, despite the fact that he had introduced no such evidence, the prosecutor argued to the jury (Tr. 3663):

We also in this case, and I will discuss it very briefly, have the Frank Jones transcript. Frank Jones, as Mr. Taxe was cross-examined on the stand, is an individual from Tennessee who came out. I asked Mr. Taxe, who denied that approximately January 5th or January 4th Mr. Jones and he had

a conversation in which Mr. Taxe attempted to tell Mr. Jones to tell the federal authorities that what he had bought were 4-track tapes, legitimate tapes, and so on. Mr. Jones made a telephone call that was placed to corroborate that telephone call, I submit to you, to make sure that what Mr. Jones had related to the federal authorities was in fact correct and accurate...

Thus, the prosecutor argued as if he had proven:

1. That petitioner had a conversation with Frank Jones on January 4th or 5th in which petitioner told Mr. Jones to lie to the federal authorities;
2. That Mr. Jones had related to the federal authorities that petitioner had told him to lie to the F.B.I.;
3. That the transcript between Jones, petitioner and Ward corroborated the earlier conversation which presumptively thus had in fact occurred.

Due objection was made by the defense to this misconduct (Tr. 3692).

The prosecutor's desire to elicit his version of the initial conversation between petitioner and Jones is manifest. The taped conversation is far more innocuous than the prosecutor desired. Under the circumstances, the prosecutor was absolutely required to put Jones on the witness stand.

As discussed previously, the assertion of facts outside the record by the prosecutor is a practice that must be condemned. ABA Standards, supra, p. 63. Prosecutors must be deterred from using the closing argument to unfairly destroy a defense. A federal prosecutor cannot be permitted to ask a defendant leading questions which assume facts not in evidence, receive a vigorous denial of those assumed facts, fail to follow up and prove those facts, then argue to the jury as if they had been successfully so proven. Under these circumstances, reversal is mandated. Jones v. United States, 338 F.2d 553 (D.C. Cir. 1964); Hall v. United States, 419 F.2d 582 (5th

Cir. 1969); Wagner v. United States, 263 F.2d 877 (5th Cir. 1959); See also United States v. Pearlstein, 120 F.2d 276, 283-284 (3rd Cir. 1941); Nalls v. United States, 240 F.2d 707 (5th Cir. 1957).

The Ninth Circuit also apparently entirely misunderstood the factual context in which the Jones issue arose. The court concluded (Slip. Op. at 10):

Appellants Richard Taxe and Ward had two conversations with one Jones. In the first they allegedly solicited Jones to represent that the tapes he had obtained through appellant's business were plainly lawful. Jones reported this alleged solicitation and, at the government's behest, phoned Taxe and Ward, who discussed the conversation in the absence of counsel [Emphasis supplied].

The court then determined that the transcript of the second conversation was properly in evidence, thus the prosecutor's remarks were fair comment.

The court did not discuss or decide the pertinent issue. The issue is not whether it was permissible for the prosecutor to comment upon the transcript which was admitted into evidence. If the prosecutor felt that the transcript supported the inference that petitioner and Rick Ward attempted in that conversation to obstruct justice, he was certainly free to so argue. The transcript, however, was ambiguous. (See for example, Rick Ward's admonition to Jones to "Just tell them the truth" (R. 3227); Ex. 645).^{24/} The egregious error that the prosecutor committed was that because the transcript did not sufficiently support his obstruction theory, he sought to use the transcript to corroborate a conversation which was not in evidence, and for which he was the sole witness, albeit unsworn. Other than the unsworn assertions of the prosecutor, there is no

^{24/} Although the Government's brief reprinted the "pertinent portions" of the Jones transcript for the court in its brief, this portion was deleted. Apparently, the Government did not consider co-defendant Ward's admonition "pertinent."

evidentiary support for the court's conclusion that "Jones reported this alleged solicitation" (Slip. Op. at 8), or for the contents of Jones' purported report.

The prosecutor was assuredly correct in his assertion that "I submit to you" for he was the only witness that offered the content of that earlier conversation.^{25/}

There was no evidence as to what Jones had told the F.B.I. about the prior conversation. For reasons known only to the prosecutor, Jones was never called as a witness. The only "evidence" was the implication implicit in the improper questioning by the prosecutor and his equally improper closing argument. Thus, by his personal vouching, the prosecutor insidiously succeeded in implanting into evidence the purported content of the earlier conversation without calling Jones as a witness and opening him to

^{25/} The prosecutor attempted to establish the earlier conversation as occurring on June 5, 1974 (Tr. 3212-3213). The transcript conversation occurred on June 6, 1974 (Tr. 3221).

cross-examination and confrontation. The prosecutor misled the court by representing that he would call Jones. Under the circumstances, the failure to call Jones as a witness is fundamentally inexcusable. As in United States v. Fearns, 501 F.2d 486, 489 (7th Cir. 1974), "[t]he prosecutor deliberately violated the fundamental rule, known to every lawyer, that argument is limited to the facts in evidence. He did so...by the blunt assertion of a fact that was not in evidence." See also United States v. David, 532 F.2d 22 (7th Cir. 1976); United States v. Burse, 531 F.2d 1151 (2nd Cir. 1976).

Our argument gains even greater force, where, as here, the alleged misconduct centers on obstruction of justice. Thus, the government attempts to prove consciousness of guilt by conduct extrinsic to the central case. When the government seeks to establish such highly probative and inherently prejudicial facts as those implicit in an allegation of obstruction of justice (particularly where the allegation is that a witness

was told to lie to the F.B.I. about his dealings with the defendants), there is no leeway whatsoever for the type of misconduct engaged in here. See Hall v. United States, supra.

Moreover, there is a serious constitutional issue which underlies the use of the transcript at all. This Court may wish to consider the constitutional permissibility of the admission of this transcript into evidence. The transcript was recorded with the consent of a government witness at the obvious insistence of the government. (See government motion for in camera inspection (Tr. 1101). One may doubt the constitutional propriety of allowing the government under the guise of investigating an obstruction of justice case to tape conversations of defendants in the absence of their lawyers. Massiah v. United States, 377 U.S. 201 (1964); United States v. Brown, 466 F.2d 493 (1972); United States v. Mele, 462 F.2d 918 (2nd Cir. 1972). We do not suggest that the government be prevented from investigating; we do, however, suggest that any statements

obtained under such circumstances cannot be used at the principal trial. Hoffa v. United States, 385 U.S. 293 (1966); United States v. Lusterino, 450 F.2d 572 (2nd Cir. 1971). Such a rule properly deters the government from seeking by guise to build its principal case by constitutional intrusions into an area so fraught and intermingled with Fifth and Sixth Amendment rights. See also Caldwell v. United States, 205 F.2d 879 (D.C. Cir. 1953); Coplon v. United States, 191 F.2d 749 (D.C. Cir. 1951).

Although no objection was raised to the admissibility of the transcript at trial, the lack of objection can be understood by reference to the transcript, which as argued by petitioner below did not support the government's strong allegations. (See for example, the admonition to Jones by appellant Rick Ward that Jones should "Just tell them the truth" (Tr. 3227). At the time the transcript went into evidence, petitioner did not know, of course, the improper use that would later be made of it by the prosecutor.

The Constitutional inadmissibility of the transcript was posited to the court of appeals which in our view incorrectly analyzed the current law by concluding that the government could permissibly use the transcript to impeach. Neither Harris v. New York, 401 U.S. 222 (1971) nor Walder v. United States, 347 U.S. 62 (1954) stand for the broad proposition that evidence otherwise inadmissible because obtained in violation of constitutional rights, is always rendered admissible when offered to impeach rather than during the prosecution's case-in-chief. In analyzing whether such impeachment is admissible, the proper focus is whether the defendant attempted to distort the truth finding process by making a false statement in the belief that he would not be subject to cross-examination because of a constitutional bar to the government's evidence. In the instant case petitioner did not refer in his direct testimony to Jones at all. The first reference to the Jones incident was on cross-examination by the prosecutor. Thus, the controlling case is neither

Harris v. New York nor Walder. The situation is governed by Agnello v. United States, 269 U.S. 20 (1925). The underpinning of Agnello, is that the government cannot bring the "impeachment" exception into play by attempting to "smuggle" the inadmissible matter in on cross-examination. Walder v. United States, 347 U.S. 62, 69 (1954). Walder and Harris stand for the proposition that a defendant may not pervert the exclusionary rule protections into a license to commit perjury. That doctrine becomes applicable where the defendant attempts in the first instance to create the false impression. Here, however, as in Agnello, the defendant "was not asked and did not testify concerning..." the Jones conversations. Agnello, supra, at 35. Similarly, "[h]e did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence..." improperly obtained.

C. Denigration of the Role of
Defense Counsel

In this conspiracy case, the key issue was clearly wilfulness. As we have discussed, the government faced a serious obstacle, for it had to prove that petitioner engaged in conduct that wilfully violated the law. In its effort to tie together a knowing conspiracy, the government argued in rebuttal (Tr. 3779-3780):

And let's examine that willfulness defense that they all raise.

It might as well have been orchestrated, because did you notice, with four defendants, nobody stepped on anybody else's toes? Did you notice they were all very careful not to hurt one another; and all of their defenses sort of dovetailed in?

Why do you suppose that is? Don't you realize, doesn't it appeal to your common sense that in most cases where there are four defendants, one would say, 'He told me to do it.'

Or 'I did it because of him.'
Or there might be some cross-friction.

Not here. Everybody helps everybody else. Nobody steps on anybody's toes. You know why? Because the defendant Richard Taxe is footing the bill, paying the bail, orchestrating everyone, telling them what to say; so they can all come into court with their little verse, their little nursery rhyme for you to tell. And their lawyers can get up here and feed you a nice line. Mr. Miller about mistakes, and 'He's a good man.' and 'We would have done it differently.' Mr. Talcott about not one shred of evidence. And Mr. Flax doesn't understand what his clients are doing in this case.

This argument by the prosecutor was made in the rebuttal portion of closing argument, at a time when no response

could be made.^{26/} See United States v. Companion, 508 F.2d 1021 (9th Cir. 1975).

The prosecutor's argument raises concern on several discrete levels. The most profound aspect is that an argument of this nature cannot be tolerated despite the fact that it found the acceptance both in the trial court and on appeal.

^{26/} Immediately following the argument, Mr. Flax, counsel for co-defendants Ronald Taxe and Ward moved for a mistrial urging that the prosecutor had improperly argued that the nature of the defense was further proof of a conspiracy among the defendants (Tr. 3813). Counsel pointed out that the prosecutor had improperly brought defense counsel's ethics into the case and that his remarks constituted unfair comment (Tr. 3813-3815). Counsel asked for an opportunity to reopen his argument for the purpose of "... rebutting Mr. Brown's allegations. I think all of us would like a chance to talk in terms of those allegations. If not, I would like some type of instruction, because I just don't think it was fair (Tr. 3814-3815). The court expressly sanctioned the prosecutor's argument and voiced its view that "...insofar as the team is concerned the record is the record. I believe that that is a fair argument, that the legal effort on the defense side was a team. All one has to do is read your own argument" (Tr. 3814).

In our view, the prosecutor's argument far exceeded the latitude of proper comment in a criminal conspiracy case.

The role of a defendant in a federal conspiracy case is difficult. As Justice Jackson so aptly put it in his famous concurrence in Krulewitch v. United States, 336 U.S. 440, 454 (1949):

A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.^{27/} If he is silent, he is taken to admit it, and if, as often happens, co-defendants can be prodded into accusing or contradicting each other, they convict each other.

^{27/} Ominously, in the instant case, the prosecutor actually did so argue with respect to attorney Siegel and Taxe whom he characterized as "frauds," indicating that "birds of a feather flock together" (Tr. 3656).

There are many practical difficulties in defending against a charge of conspiracy which I will not enumerate.

In the instant case, the government seeks to add a new and devastating weapon into the already overwhelming conspiracy arsenal -- they have now received sanction for the proposition that in a conspiracy case, they may permissibly argue that a consistent and joint defense is itself evidence of a criminal conspiracy that can be so considered by the jury. If the government's view is accepted, it necessarily follows that in conspiracy cases, each defense counsel in argument must aid the government--they must argue that the government has proven a case against all others--except their client --lest the government be permitted to comment, as this prosecutor did, that defense counsel's failure to separate himself from the co-defendant is itself evidence of a conspiracy which the jury could properly consider. This, despite the fact that an attorney, as counsel did here, may desire to argue that the

government has failed to prove any conspiracy, let alone a conspiracy against his client. Indeed, if the first two paragraphs of the prosecutor's argument (quoted above) are isolated, one can see its applicability to every conspiracy case where there is a joint defense. The government cannot be afforded this added advantage which attempts to make a presumption of guilt. Moreover, there was no evidence whatsoever that petitioner was "orchestrating everyone, telling them what to say; so they can all come into court with their little nursery rhyme for you to tell," nor was there any evidence to support the assertion that petitioner was paying Ronald Taxe or Rick Ward's attorney's fees.^{28/}

^{28/} Indeed, appellant Ronald Taxe and Ward's counsel pointed out to the court, that Datax Corporation, not Richard Taxe, had paid his attorney fees (Tr. 3816). The trial evidence had indicated that Datax was owned by the Taxe family (Tr. 3024). Datax was not related to Gault (Tr. 3051). There was only evidence that Richard Taxe had paid the bail
(Continued)

No less serious is the interwoven criticism of defense counsel who participated in this "orchestration" and allowed everyone to "come into court with their little verse, their little nursery rhyme,"^{29/} and who "can get up here and feed you a nice line." Later, the prosecutor charged (Tr. 2802-2803):

Defense counsel will have you believe this is a complicated law, full of all sorts of very difficult to understand terms and language.

28/ Continued:

and legal fees for Gonzales and Merton (Tr. 3288, 2904-2905).

29/ Precisely who the prosecutor contended was orchestrated, who was told what to say, or who had a nursery rhyme is certainly unclear. The only defendants who testified were Richard Taxe and Geraldine Gonzales. Again, there was no evidence whatsoever introduced to support the prosecutor's allegations. To the extent that the prosecutor was urging that "nobody stepped on anybody else's toes, i.e., did not testify, and the implicit assumption that they so refused out of allegiance to petitioner, the argument is constitutionally egregious. See Griffin v. California, 380 U.S. 609 (1965); Doyle v. Ohio, ___ U.S. ___ (1976).

Remember one thing, they are attempting to confuse you.

"Counsel for the accused is an essential component of the administration of criminal justice." ABA Project on Standards for Criminal Justice, Standards Relating to the Defense Function §1.1(a). (Approved Draft, 1971). A prosecutor cannot be allowed free rein to level the kinds of allegations charged here. He cannot be permitted to challenge the sincerity of defense counsel by arguing "their lawyers can get up here and feed you a nice line" and were "trying to confuse you," or that the defense counsel's tactics could be considered by the jury as evidence of conspiracy.

The prosecutor's comments were not at all proper in this light. To buttress the strength of the government's case by denigrating the role of the accused's counsel cannot be tolerated and was clearly error in this case. United States v. Klugman, 506 F.2d 1378, 1381-1382 (6th Cir. 1974).

In Wagner v. United States, 263 F.2d 877, 884 (1959), the Fifth Circuit held an argument similar to the one conducted here (which attempted to create an inference of conspiracy based upon the lawyer's conduct and which reflected on the sincerity of counsel) to be so "wholly impermissible" that it constituted "plain error." Wagner, of course, does no more than vitalize a notion that should be apparent to any prosecutor. The government cannot be permitted to turn a defendant's reliance on a lawyer into an instrument of oppression against him. The Sixth Amendment undertones are manifest. United States ex rel Macon v. Yeager, 476 F.2d 613 (3rd Cir. 1973), cert. denied, 414 U.S. 855; See also United States v. Gonzales, 488 F.2d 833 (2nd Cir. 1973) (Comment on counsel's successful evidentiary objections); Weathers v. United States, 117 F.2d 585 (5th Cir. 1941), cert. denied, 316 U.S. 681. On appeal the court concluded that "[t]he government's unprofessional remarks on the conduct of the defense are troublesome" (Slip. Op. at 8). Although

the court determined that "... the denigration of counsel was neither supported by the evidence nor reasonable" (ibid.), it placed its imprimatur on the prosecutor's comments that the jury could infer conspiracy from the strategy of a joint defense. With reference to these comments, the court concluded, as did the district court, initially, that "[r]easonable comment on these matters was proper." (ibid.). This conclusion is an unwarranted invitation to further extravagant misconduct by federal prosecutors.

This Court should not allow the engrafting upon federal criminal law the permission to argue as the prosecutor did here. Comment on this matter is not reasonable. We submit that any such comment is per se unreasonable and totally improper. The existence of a consistent and joint defense in a conspiracy case cannot properly be considered as substantive evidence of a conspiracy. Such comment distracts the jury from its true role in determining guilt or innocence of specific facts based on factual, sworn

evidence. It truly distorts the truth-finding process to allow a jury to infer guilt from tactical decisions of counsel at trial.

D. Derogatory Characterizations

During his argument, the prosecutor described petitioner as a "scavenger" on two occasions (Tr. 3624, 3641) and as a "parasite" (Tr. 3641). Describing the attorney who advised petitioner upon the legality of his actions as a "fraud," the prosecutor further commented that "birds of a feather flock together" (Tr. 3653). The prosecutor also referred to petitioner as a "professional con man" (Tr. 3656).

The court in Hall v. United States, 419 F.2d 582, 587 (5th Cir. 1969) cogently observed:

This type of shorthand characterization of an accused, not based on evidence, is especially likely to stick in the minds of the jury and influence its deliberations.

Out of the usual welter of grey facts it starkly rises -- succinct

-- pithy, colorful and expressed in a sharp break with the decorum which the citizen expects from the representative of his government.

In our view, these characterizations are further examples of overzealousness that should not be condoned by this or any Court. They fall far below the standards required of a federal prosecutor. Berger v. United States, supra.

III

THE COURT IMPROPERLY FAILED TO
INVALIDATE SEARCH WARRANTS BASED
ON AFFIDAVITS WHICH CONTAINED
MATERIAL MISREPRESENTATIONS: AS
A CONSTITUTIONAL MINIMUM, THE
COURT SHOULD HAVE CONDUCTED A
HEARING

On January 25, 1974, F.B.I. Special Agent Gary Kanaskie affirmed four separate search warrant affidavits which led to the issuance of four search warrants, which produced the bulk of the tangible evidence ultimately produced at trial. Despite lengthy affidavits which attempted to support his desire to search the premises located at 6330 Arizona Circle, Agent Kanaskie chose not to advise the the magistrate that on January 23, 1974, he and other agents of the F.B.I. had conducted a lengthy search of those premises and that no illegally duplicated tape recordings had been found. Despite this fact, Agent Kanaskie affirmed that "at 6330 Arizona Circle, Los Angeles, California is located business records, illegal duplicated tape recordings ..." (R. 390)

[Emphasis added].

The search warrant issued in reliance on these affidavits states (R. 367):

There is now being concealed certain property namely 'stereo tape cartridges which have been manufactured from sound recordings protected by the Copyright Act.'

The district court concluded that these statements, "even if that is assumed to be false [were] immaterial, in that it is entirely cumulative and unnecessary to the result" (Tr. 259-260). The court failed to either invalidate the warrant or to hold a hearing to determine the reasons for the misstatements.

The Fourth Amendment to the United States Constitution provides that:

[N]o warrants shall issue, but upon probable cause, supported by oath or affirmation.

At the very core of the Fourth Amendment guarantee is the firm notion

that warrants are to be authorized by "a neutral and detached magistrate ... [not an] officer engaged in the often competitive enterprise of ferreting out crime." Johnson v. United States, 333 U.S. 10, 14 (1948). In order to effectuate the broad policies underlying the Fourth Amendment, it necessarily follows that in order to reach a constitutionally proper determination, a magistrate must be advised of all relevant facts.

This Court has never "... passed directly on the extent to which a court may permit [examination] of the validity of a search warrant when the search warrant is valid on its face and when the allegations of the underlying affidavit establish 'probable cause'." Rugendorf v. United States, 376 U.S. 528, 531-532 (1964). In United States v. Damitz, 495 F.2d 50 (1974), the court held it proper for a trial court to allow a hearing challenging the veracity of an affidavit. The court concluded (at 54):

A review of the veracity of the affidavit may also be dictated by the exclusionary rule. A warrant is issued in an ex parte proceeding, in which there is no effective way for the magistrate to determine the veracity of the allegations; the most he can do is question the affiant and examine the affidavit for internal inconsistency.

See also United States v. Morris, 477 F.2d 657 (5th Cir. 1973); United States v. Harwood, 470 F.2d 322 (10th Cir. 1972); United States v. Uphshaw, 448 F.2d 1218 (5th Cir. 1971); United States v. Roth, 391 F.2d 507 (7th Cir. 1967); United States v. Ramos, 380 F.2d 717 (2nd Cir. 1967) (dictum).

The Ninth Circuit had earlier determined in United States v. Bolton, 458 F.2d 377, 378, n. 6, that:

...when a defendant can make a substantial showing of falsehood or other imposition upon the magistrate, then the trial court is required to conduct a hearing

concerning the truth of the facts asserted in the affidavit.

United States v. Harris, 501 F.2d 1 (9th Cir. 1974).

In our view, there can be no excusal for the failure to advise the magistrate of the essential underlying facts concerning the earlier search. Agent Kanaskie's reason for his failure to so advise is manifest. If the magistrate had been advised of the fruitless nature of the search conducted two days previously, he could not, without more, reasonably conclude (as Agent Kanaskie assuredly desired) that the particular search would produce illegally duplicated tapes. Indeed, he had every reason to believe that such a search would not produce such tapes.

For constitutional purposes, the district court focused on an improper standard. The court concluded that even if false, the statements were immaterial in that a warrant would still have been issued had the false statements been stricken (R. 259-260).

Where a misstatement by a law enforcement officer is intentional, the policies underpinning the exclusionary rule require suppression. Thus, in United States v. Damitz, supra, the court concluded that at least where false statements by third parties are concerned, the warrant is valid if the true facts are sufficient to establish probable cause. The court indicated, however, that "[t]he case might be different if a government agent had made an affidavit containing material false statements." (495 F.2d at 55).

The Damitz dictum is consistent with the widening trend which has engaged in reassessment of the earlier rigidity. In United States v. Carmichael, 489 F.2d 983, 988 (1973), the Seventh Circuit en banc held that a defendant is

...entitled to a hearing which delves below the surface of a facially sufficient affidavit if he has made an initial showing of either of the following: (1) any misrepresentation by the government agent of a material fact, or (2) an

intentional misrepresentation by the government agent, whether or not material.

Significantly, the court concluded that if the hearing determines the government agent to be "recklessly or intentionally untruthful," the evidence must be suppressed regardless of whether the affidavit was sufficient if considered absent the misrepresentative portions. The court in Harris, supra, cited Carmichael with approval.

Carmichael has also been adopted by the Eighth Circuit in United States v. Marihart (492 F.2d 897, 899-900):

[W]e conclude that if deliberate government perjury should ever be shown, the court need not inquire as to the materiality of the perjury. The fullest deterrent sanctions of the exclusionary rule should be applied to such serious and deliberate government wrongdoing. 'The rule we announce today is intended only to test the credibility of government agents whose

affidavits or testimony are before the magistrate.'

[Carmichael at 988].

The Fifth Circuit has adopted an analogous but somewhat different approach. United States v. Thomas, 489 F.2d 664 (5th Cir. 1973). However, under Thomas, a warrant will be invalidated if it contains a negligent but unintentional misrepresentation that was material. Thomas also requires that a non-material misstatement be made with intent to deceive the magistrate before a warrant will be vitiated.

Recently, the United States Court of Appeals for the First Circuit considered a similar issue in United States v. Belcufine, 508 F.2d 58 (1974). The court concluded (at 62-63):

We are sensitive to the fact that allowances must be made for errors in judgment, observation or memory on the part of fallible human beings endeavoring faithfully to carry out the duties of office, sometimes under conditions of great pressure.

But we see no policy reason for overlooking intentional, relevant, and non-trivial misstatements in an affidavit which could subject any maker of such be he an official or a private citizen to a fine or imprisonment for perjury under 18 U.S.C. 1621 [footnote omitted]. Indeed, policy suggests particular sensitivity to such misstatements in an affidavit for a search warrant which is necessarily granted ex parte and in complete reliance upon the truthfulness of the statements in the affidavit.

The essence of these cases is that for Fourth Amendment purposes, the misrepresentation cannot be extracted and the affidavit then held up to constitutional scrutiny in its absence. This was precisely the error of the court below. But the essence of the Carmichael-Thomas-Belcufine line of authority is captured by the cogent observation in Belcufine (508 F.2d at 63):

Were the judicial response to be merely the elimination of the false statements and the assessment of the affidavit's adequacy to light of the remaining averments, enforcement officers would be placed in the untoward position of having everything to gain and nothing to lose in strengthening an otherwise marginal affidavit by letting their intense dedication to duty blur the distinction between fact and fantasy. We therefore see no supportable alternative to suppression of evidence obtained pursuant to a warrant based on an affidavit containing an intentional, relevant and non-trivial misstatement.

The Ninth Circuit misapplied applicable law by concluding that a hearing was not required because "[t]he record contains no substantive showing of falsity." Under the circumstances presented here, petitioner was entitled to a hearing to demonstrate falsity and the materiality of the omission.

IV
CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,
FLAX AND ROSENFELD

By: RICHARD L. ROSENFELD
Attorneys for Petitioner
RICHARD TAXE

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,	<i>Appellee,</i>	No. 74-3094
vs.		
RICHARD TAXE,	<i>Appellant.</i>	
UNITED STATES OF AMERICA,	<i>Appellee,</i>	No. 74-3471
vs.		
RONALD TAXE,	<i>Appellant.</i>	
UNITED STATES OF AMERICA,	<i>Appellee,</i>	No. 74-3153
vs.		
GERALDINE GONZALES,	<i>Appellant.</i>	
UNITED STATES OF AMERICA,	<i>Appellee,</i>	No. 74-3471
vs.		
RICHARD WARD,	<i>Appellant.</i>	OPINION

[June 8, 1976]

Appeal from the United States District Court
for the Central District of California

Before: HUFSTEDLER, WRIGHT, and GOODWIN,
Circuit Judges.

GOODWIN, Circuit Judge:

Four defendants were charged with multiple counts involving "record piracy". All four were convicted of willful infringement of copyrights for profit, 17 U.S.C. §§ 1(f), 101(e), 104, and conspiracy, 18 U.S.C. § 371. In addition, defendant Richard

Taxe was convicted of mail fraud, 18 U.S.C. § 1341. Along with other issues, their combined appeal challenges the 1971 Sound Recording Amendment to the Copyright laws, Act of October 15, 1971 (Pub. Law 92-140, 85 Stat. 391), as further amended by the Act of December 31, 1974 (Pub. Law 93-573, 88 Stat. 1873).

Richard Taxe directed the operation. Stereo records of eight-track stereo tape recordings manufactured by major record companies were purchased on the open market from retail outlets. With specially adapted electronic tape equipment, the commercially acquired records or tapes were re-recorded with changes in one or more of the following respects: the recording speed was increased or decreased; reverberation or echo was introduced; certain portions of the musical sounds were eliminated or reduced in volume; and additional sounds were produced by synthesizers. The eight-track stereo tapes thus created were thereafter sold to the public.

Sales were promoted through national advertising. The advertisements presented the tapes as authentic. The jackets for the individual tapes described the enclosed recordings as "Today's hits as done by your favorite artists. Custom simulated by Sound 8 singers and musicians."

Ronald Taxe was the shipping foreman. Rick Ward was the sales director. Geraldine Gonzales worked in production.

The defendants present a number of issues on appeal, beginning with an attack upon the statute as vague and overbroad.

I.

The 1971 Sound Recording Amendment extends limited copyright protection to sound recordings fixed after February 15, 1972. 1 M. Nimmer, *The Law of Copyright* § 35, at 246.3 n.3, and § 109.20 (1975). The copyright owner acquires the exclusive right to duplicate but this does not bar independent fixation by another of other sounds similar to those copyrighted. 17 U.S.C. § 1(f). The defendants assert that the terms "sound recording", "duplicate", and "independent fixation" are unconstitutionally vague.

Sound recordings are works that result from the fixation of a series of sounds. 17 U.S.C. § 26. Fixation, as defined by the Copy-

right Office, occurs when a complete series of sounds is first produced on a final master recording that is later reproduced in published copies. 37 C.F.R. § 202.15a(b). Duplication, while not statutorily defined incorporates the rights to copy and record and can be fleshed out by reference to them. 1 Nimmer, § 109.21. In view of the definition of fixation, the statutory language is not so vague that men of common intelligence must necessarily guess at its meaning.¹ See *Grayned v. City of Rockford*, 408 U.S. 104 (1972); see also *Shaab v. Kleindeinst*, 345 F. Supp. 589 (D.D.C. 1972).

II.

When instructing the jury, the trial judge defined "independent fixation" as a separate performance, expressly excluding re-recording, even with changes. He went on to instruct that since a new fixation by re-recording with modifications is not an independent fixation, it constitutes infringement. Appellants claim this instruction both misstated the law and removed from the jury a matter within its exclusive province. The government supports the part of the instruction paraphrased above, but objects to language later in the instruction directing the jury to compare tapes and to find no infringement if the appellants' final product was no longer recognizable as the same performance originally recorded.

We believe the instruction went beyond the law insofar as it purported to characterize any and all re-recordings as infringements, but the subsequent inclusion of a comparison test permitted the jury to consider "substantial similarity", and cured any error in the earlier part of the instruction.² See 1 Nimmer at § 109.21.

¹Other constitutional challenges to the 1971 amendments to the Copyright Act have also been rejected. *United States v. Bodin*, 375 F. Supp. 1265 (W.D. Okla. 1974) (17 U.S.C. §§ 101(e) and 104 do not deny free expression, and §§ 1(f) and 101(e) do not deny due process); *Heilman v. Levi*, 391 F. Supp. 1106 (E.D. Wis. 1975) (prohibition of "unauthorized use" in 17 U.S.C. § 101(e) is not unconstitutionally vague).

²To be distinguished is production of a "substantially similar" work without any actual sound duplication. Professor Nimmer believes that such a "mere imitation" would not infringe the § 1(f) right to "duplicate the sound recording in a tangible form that directly or indirectly captures the actual sounds fixed in the recording." 1 M. Nimmer, *The Law of Copyright* § 109.2-109.21. The copyright owner's right to reproduce the

Appellants next object to the absence of a detailed instruction on willfulness under the statute. The term was mentioned three times in the infringement instruction and defined in the course of the general instructions. There was no reversible error in the instructions.

III.

Appellants contend that, even if facially constitutional, the statute as applied by the Registrar of Copyrights fails to give fair notice of what is copyrighted. The Registrar permits an album to carry a single notice, yet individual bands (songs) on that album may not be eligible for copyright. Appellants say that mingling of protected and unprotected matter in a single copyright fails to give fair notice and protects uncopyrightable matter.

The copyright of an item containing protectible and unprotectible parts is expressly contemplated in 17 U.S.C. § 3:

"The copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted * * *."

Individual songs are component parts of an entire record album. The copyright of an album protects only the copyrightable songs (those fixed after February 15, 1972). The single notice is adequate since, for \$2,000, anyone can obtain a copy of the copy-

sound recording is limited to recapture of the original sounds, but that right can be infringed by an unauthorized re-recording which, despite changes in the sounds duplicated, results in a work of "substantial similarity". This holds even though the sound recording copyright is not expressly vested with the right to produce derivative works. Whether or not the copyright owner has that right, he can protect his right of reproduction from persons who produce an audibly equivalent work by re-recording. Indeed, appellants' characterization of their tapes as derivative works is both erroneous and harmful to their interests.

" * * * [A] work will be considered a derivative work only if it would be considered an infringing work if the material which it has derived from a prior work had been taken without the consent of a copyright proprietor of such prior work. It is saved from being an infringing work only because the borrowed or copied material was taken with the consent of the copyright owner of the prior work, or because the prior work has entered the public domain." 1 M. Nimmer, *The Law of Copyright* § 39, at 167.

right certificate and determine which songs are protected. See 17 U.S.C. § 215.

As for the certificates, appellants charge that these documents are intolerably vague in spelling out the dates of fixation. Every application for a certificate requests the dates by direction to the applicant to designate "new matter". Such "matter" includes sound recordings first fixed after February 15, 1972. This designation is adequate.

Appellants also object to the instruction that certificates of copyright are prima facie evidence of the dates of fixation. The governing statute provides: "[s]aid certificate[s] shall be admitted in any court as prima facie evidence of the facts stated therein * * *." 17 U.S.C. § 209. In *Rohauer v. Friedman*, 306 F.2d 933 (9th Cir. 1962), this court accepted and applied the statute. *Rohauer* was decided when sound recordings were not yet eligible for copyright, and fixation was not one of the certificate's disclosed facts. However, the statute's broad and unequivocal language suggests that the date of fixation is within its terms. While the certificates are hearsay when offered to prove the truth of the date thereon, the certificates should be deemed at least prima facie accurate about the dates of fixation until the contrary appears. There was no known reason for them to be inaccurate. Appellants offered no proof, and have suggested no basis for attacking the validity of any particular fixation dates. Absent a concrete showing of lack of trustworthiness, the admission of the certificates and the attendant instruction was proper. Cf. 28 U.S.C. § 1733, and Fed. Rules of Evid. 803 (8).

IV.

The trial judge determined that the copyright notice of a sound recording should be understood to apply to the individual bands or songs. The United States, therefore, submitted twenty-six songs as infringed. Appellants argue variance in that the indictment charged infringements of entire albums. Individual components (bands or songs) of a larger work (an album) may or may not be protectible. 17 U.S.C. § 3. The copyright claimed for an album can be infringed by unauthorized duplication of any copyrightable component part. By instructing as he did, the trial judge did not narrow the indictment; he simply correctly determined the nature of the sound recording copyright.

V.

Appellants also charge that the judge functioned as a prosecutor, provided too little time to review jury instructions, and unfairly limited the appellants' time to present their case. None of these charges is supported by the record. The cases cited (*United States v. Harris*, 501 F.2d 1 (9th Cir. 1974); *United States v. Hoker*, 483 F.2d 359 (5th Cir. 1973); and *Blunt v. United States*, 244 F.2d 355 (D.C. Cir. 1957)) involved conduct significantly more blatant. As for the time pressures, the United States took four weeks to present its case while the defendant took only about two days. But much of the first four weeks included defense activities during the government's case. It is meaningless to count time the way appellants would have us count it in this case. From the earliest stages of the trial, the judge indicated his desire to keep it moving. In a complex case with many issues and parties, such exhortations are frequently necessary. The court did not prevent a full exposition of defense argument. Appellants were not prejudiced.

VI.

In the course of preindictment investigation, government agents had the appellants' tape warehouse under surveillance on January 22, 1974. That evening, eight persons were observed hurriedly loading hundreds of boxes into two trucks. When the trucks departed, the agents followed them. The trucks separated for awhile, then reunited. The agents believed the drivers were attempting to determine whether they were being followed. Appellants were aware that the FBI was investigating their activities. When the trucks subsequently stopped, the agents approached and identified themselves. The drivers turned out to be appellants Richard and Ronald Taxe. After advising the Taxes of their rights, (but not arresting them), the agents requested permission to search the trucks. The Taxes refused; they also refused to drive the trucks to an FBI lot. Subsequently, however, they moved the trucks to a site near the FBI building. They refused to surrender the keys, and departed. Thereafter, the agents broke the locks and searched the vehicles. They found 80,000 tapes, of which 19,000 were of albums produced after February 15, 1972. None of these tapes was admitted as evidence.

but an agent testified about the search and the prosecutor referred to that testimony in his arguments to the jury.

The agents may have lacked sufficient probable cause to search the trucks. See *United States v. Ortiz*, 422 U.S. 891 (1975). If they did, it was error to permit a witness and the prosecutor to mention the search. However, on the whole record in this case we believe that the error, if any, was harmless. There were so many other tapes tending to prove the government's case that the reference to the tapes in the trucks was immaterial.

VII.

Appellants next claim that they were entitled to a hearing to test the accuracy of the affidavit underlying the search warrants issued for certain premises. Defendants may sometimes challenge the veracity of an affidavit. *United States v. Harris*, 501 F.2d 1, 5-6 (9th Cir. 1974); *United States v. Damitz*, 495 F.2d 50, 54 (9th Cir. 1974). Richard Taxe had standing to raise this claim. *Brown v. United States*, 411 U.S. 223 (1973). In the affidavit, an FBI agent stated he believed that illegal tapes would be found on Taxe's business premises. He did not mention the earlier truck search or that he had seen no illegal tapes on an earlier tour of the premises guided by Richard Taxe. The trial court ruled that these omissions were immaterial, and we agree. Appellants also argue that the agent made an intentionally false statement. *United States v. Luna*, _____ F.2d _____ (6th Cir. 1975); *United States v. Carmichael*, 489 F.2d 979 (7th Cir. 1972). The record contains no substantial showing of falsity. *United States v. Bolton*, 458 F.2d 377, 378 n.6 (9th Cir. 1972). Indeed, the agent's belief appears to have been well founded.

VIII.

In argument to the jury, the prosecutor (a) referred to appellant Richard Taxe as a "fraud", "scavenger", "parasite", and "professional con-man"; (b) stated that Taxe was "orchestrating everyone" so his lawyers could "get up here and feed you a line"; (c) commented on the substance of a post-indictment conversation without counsel in which appellants Richard Taxe and Ward allegedly solicited one Jones to lie to the prosecution; (d) noted that appellants Richard and Ronald Taxe did not consent

to a search of their trucks by FBI agents; (e) in describing the case as limited to the issue of willfulness, queried, "Why else would [the appellants] have forced the government to present the many witnesses and exhibits regarding all of those other aspects of this trial • • •"; and (f) commented on out-of-court statements by coconspirators who did not testify.

The above described trial conduct must be considered in the context of the entire trial. *Donnelly v. De Christoforo*, 416 U.S. 637 (1974). The trial judge instructed that the prosecutor's argument was not evidence. The "scavenger" and "parasite" characterizations were based on evidence that Taxe was profiting at the expense of copyright owners. The "fraud" description was supported by evidence of misleading representations made to customers. The "professional con-man" label lacks specific evidentiary foundation but does not appear to have been much of an exaggeration, and was certainly not so prejudicial as to have deprived Taxe of a fair trial. Compare *Hall v. United States*, 419 F.2d 582 (5th Cir. 1969).

The government's unprofessional remarks on the conduct of the defense are troublesome. They suggest for the jury an inference of conspiracy from defense strategy and reflect on the sincerity of the defense counsel. See *Wagner v. United States*, 263 F.2d 877 (5th Cir. 1959). Appellant Geraldine Gonzales alone testified at trial that Richard Taxe had paid her bail and was paying for her legal fees but the defense could be fairly described as team-oriented. Reasonable comment on these matters was proper, but the denigration of counsel was neither supported by the evidence nor reasonable. This misconduct by an overanxious prosecutor, however, was not sufficiently prejudicial to warrant reversal. See *United States v. Klugman*, 506 F.2d 1378 (8th Cir. 1974); see also *United States v. Perez-Martinez*, _____ F.2d _____ (9th Cir. 1975).

IX.

Appellants Richard Taxe and Ward had two conversations with one Jones. In the first, they allegedly solicited Jones to represent that the tapes he had obtained through appellants' business were plainly lawful. Jones reported this alleged solicitation and, at the government's behest, phoned Taxe and Ward,

who discussed the earlier conversation in the absence of counsel. Both conversations took place after appellants had been formally charged. The phone conversation was taped, and when Taxe denied on cross-examination soliciting Jones, a transcript of the tape was admitted for impeachment.

Appellants object to the prosecutor's noting that conversation, and now claim, for the first time, that admission of the transcript violated appellants' Fifth and Sixth Amendment rights. Questioning in the absence of counsel after formal charges by a government "agent" and introduction of the incriminating statements obtained are disapproved by *Massiah v. United States*, 377 U.S. 201 (1964). In *Massiah*, the statements were used to prove guilt directly; here, the conversation was used only to impeach. Under *Hoffa v. United States*, 385 U.S. 293 (1966), the Jones transcript would be admissible in a subsequent trial for obstruction of justice. The use of the transcript to impeach at the current trial is not clearly governed by either *Hoffa* or *Massiah*. Though it involves alleged criminality, there is no suggestion of entrapment and it does not appear that the prosecution was building its case-in-chief through Jones. See *United States v. Merritts*, _____ F.2d _____ (7th Cir. 1975). With solicitation the charge, no potentially legitimate client-counselor communication is in issue. The focus in *Massiah* (self-incrimination on the existing charges) is also absent. Accordingly, use of the transcript to impeach was not error. See *Walder v. United States*, 347 U.S. 62 (1954), and *Harris v. New York*, 401 U.S. 222 (1971).

With the transcript properly in evidence, the prosecutor's remarks were fair comment. The cases on which appellants rely (*Hall v. United States*, *supra*; *Jones v. United States*, 338 F.2d 553 (D.C. Cir. 1964); and *Wagner v. United States*, *supra*) are all distinguishable.

X.

The prosecutor's comments on the Taxes' refusal to consent to a search of their trucks was misconduct. See *Griffin v. California*, 380 U.S. 609 (1965). But, again, we believe that a subsequent curative instruction and the facts as a whole indicate that the error was harmless.

XI.

Appellants' remaining challenges to prosecutorial comments are without merit. While the prosecutor commented on out-of-court statements by coconspirators who did not testify, those statements were properly in evidence, *Anderson v. United States*, 417 U.S. 221 (1974), and comment was permissible. As for describing the case as reduced to the issue of willfulness and then asking rhetorically why the appellants forced the government to present evidence and witnesses on other issues, the prosecutor was only tangentially referring to exercise of the right to jury trial and the comment did not penalize that right. See generally *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir.), cert. denied, 414 U.S. 855 (1973) (comment on right to counsel reversible error on the facts).

XII

Appellants relied heavily on advice that Richard Taxe received from an attorney that his re-recording process would not infringe copyrights. The attorney so testified at trial. When instructing the jury on the weight to be accorded advice of counsel, the court described such advice as "no defense".³ That description does not require reversal. *Bisno v. United States*, 299 F.2d 711 (9th Cir. 1961), cert. denied, 370 U.S. 952 (1962). The court made it clear that the advice should be considered in determining whether appellants' actions were "willful". This was a correct instruction on a disputed question of fact.

Appellants assert a number of other alleged grounds for reversal.⁴ We have studied them all carefully. It was a long trial. It dealt with novel and complex legal questions. The trial was not free of error. It would be surprising if it were. It was a fair trial. The defendants were convicted, not by prosecutorial

³The court instructed:

"Advice of counsel is not a defense to any crime charged in this indictment. It is only a circumstance which should be considered by you on the issue of intent, i.e., in determining whether a defendant was acting in good faith and lacked the requisite criminal intent."

⁴Besides the objections already considered on the infringement and advice-of-counsel instructions, appellants object to the court's instructions on credibility of witnesses and conspiracy. In addition, they claim prejudice in the alleged erroneous admission into evidence of testimony and

overzealousness or judicial error, but by overwhelming evidence of their guilt.

Taxe attacks the constitutionality of 28 U.S.C. § 1918(b), a general statute that permits the court to order a convicted defendant to pay the costs of prosecution. We do not reach the constitutional questions on the present record because the district court's imposition of the costs of prosecution must be vacated on other grounds. The imposition of costs based on his conviction upon twenty counts charging violations of 17 U.S.C. §§ 1(f), 101(e), and 104, and upon one count, charging him with conspiracy to violate these sections, is foreclosed by 17 U.S.C. § 116, which provides:

"In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney's fee as part of the costs" (Emphasis added.)

The district court did not purport to segregate costs of prosecution attributable to the five mail fraud counts from such costs attributable to the copyright counts. We have no way in which to separate imposition of costs excepted by Section 116 from those that could possibly have been imposed for the mail fraud counts. Even in respect of the latter, a serious statutory problem arises because the district court imposed the \$1,000 maximum statutory fine, authorized by 18 U.S.C. § 1341, for each of the five mail fraud counts. Section 1341 does not authorize the assessment of costs in addition to a fine as do some other criminal statutes. If the assessment of the costs of prosecution here, as it was in *United States v. Ducharme*, 505 F.2d 691 (9th Cir. 1974), is "tantamount to increasing that [maximum] fine" (*Id.* at 692), the imposition of costs exceeded the maximum fine authorized by Congress for the offense. The *Ducharme* question can be resolved on remand.

numerous tapes, copyright certificates, air-freight bills, and checks which first came in on counts against Richard Taxe for mail fraud and interstate transportation of stolen property (ITSP). Appellants argue that the evidence was irrelevant, particularly in light of the dismissal in the course of the trial of the ITSP counts.

The order imposing costs of prosecution upon Taxe is vacated and that portion only of the judgment is remanded to the district court; the judgment in other respects is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
)
 v. Plaintiff,)
)
 RICHARD TAXE, RONALD TAXE, RICK)
 WARD and GERALDINE GONZALES,)
)
 Defendants.)

NO. CR 74-800-IH

MEMORANDUM OPINION
RE JURY INSTRUCTIONS

The Court is informed that the instant case is the first criminal prosecution under the 1971 Sound Recording Amendment to the Copyright Act which has been tried to a conclusion. The case involved eight-track stereo tape recordings. After a jury trial lasting approximately six weeks, the above named Defendants were convicted of conspiracy to violate the Copyright Act (1 count), copyright infringement (20 counts), and mail fraud (4 counts involving one Defendant only). Under the evidence, Defendants manufactured their tapes by re-recording hit tapes produced and distributed by major record companies. The re-recordings were done in each instance with one or more of

the following changes: speeding up, slowing down, deletion of certain frequencies or tones, addition of echoes or moog synthesizers.

Because the case was apparently an important one and a case of first impression, the Court feels that there should be published the portions of its jury instructions which define the intent and scope of the 1971 statute and the elements of the criminal offense of infringement thereunder. Those portions of the jury instructions follow the text of this Memorandum Opinion.

There are certain legal issues which were confronted and resolved in the preparation of the instructions. The Court feels that some explanation of the legal analysis underlying its resolution of those legal issues is appropriate for publication and so that, upon appeal of the convictions, the Court of Appeals may know the basis of the Court's reasoning. These legal issues which the Court confronted are:

I. Is an album copyrightable which consists of many songs, some of which were first fixed prior to February 15, 1972,

and others first fixed after February 15, 1972, and, if so, to what extent is it copyrightable?

II. What effect, if any, do changes made by the re-recorder of the type above described have on the offense of infringement? In this connection, what place, if any, is given to the copyright doctrine of "substantial similarity" in defining the criminal offenses involved in this case?

TAPES CONTAINING BOTH PRE FEBRUARY
15, 1972 FIXINGS AND POST FEBRUARY
15, 1972 FIXINGS

The statute in question covers only sound recordings first fixed after February 15, 1972, 17 U.S.C. §1(f). A record album or long-playing tape often contains several separate "songs" or "bands". Of course, if every song or band was first fixed after February 15, 1972, the entire work (the long-playing tape) would be copyrightable. In this case, the Court was faced with the question of the effect of including on a long-playing tape some songs first fixed on a master prior to February 15, 1972, along with

other songs first fixed on a master after February 15, 1972. As will be seen from the following instructions, the Court held that the copyright of the tape protected only those songs first fixed on a master after February 15, 1972. The other songs were held not to be protected.

This result can be explained on two related grounds. First, such a tape must be viewed as a "derivative work", 17 U.S.C. §7. See Nimmer on Copyright, §§39-41. As a derivative work, the entire tape is copyrightable but it is protected only insofar as portions of it meet the copyright requirement of "originality". Obviously, the re-recording of a previously fixed song cannot meet the originality requirements, and those portions of such a derivative work are unprotected. Second, a common sense reading of the sound recording amendment of 1971 yields the same result, since the restriction of protection to works fixed after February 15, 1972, would be meaningless if works fixed before that date could gain protection simply by being re-recorded in new albums.

Therefore, the Court has concluded that if the work in question, i.e., the complete tape, was fixed after February 15, 1972, all portions of that work which had not previously been fixed are protected, and a re-recording (as described below), of any of those portions would be an infringement.

In this case, there was testimony from a FBI sound expert concerning one song on each allegedly infringing tape. There was independent evidence as to each of those songs that the performance of it had not been fixed prior to its fixation in the copyrighted works, after February 15, 1972. Since the testimony of the sound recording expert, corroborated by other testimony including admissions by Defendant Richard Taxe, indicated a re-recording of those songs (as well as the rest of the long-playing tapes), the Court holds such evidence to be sufficient on the question of infringement. Clearly, the taking of an entire song from a long-playing tape or album is a substantial taking meeting the requirements of the Copyright Act.

THE EFFECT OF CHANGES BY THE RE-RECORDER

As indicated above, the Defendants in this case re-recorded the copyrighted songs, but changed them in most or all instances by speeding up the sounds, slowing down the sounds, deleting certain frequencies or tones or adding echoes or sounds from a moog synthesizer. The evidence revealed that these changes were insubstantial to the human ear and were intended to be so. The question is raised as to the effect of said changes on the question of infringement.

It should be clear that such re-recordings violate §1(f). That section gives the copyright holder the exclusive right to reproduce and to distribute to the public reproductions of his copyrighted work. The first proviso of that section limits that exclusive right to the right "to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sound fixed in the recording." The second proviso explains further that said right "does not extend to the making or duplication of another sound recording that is

an independent fixation of other sounds even though such sounds imitate or simulate those in the copyrighted sound recording." The language of the statute makes clear that the demarcation between infringing works and legal imitations or simulations inheres in the manner of production of the allegedly infringing work. If the work is produced by re-recording the original sounds, or "recapturing" those sounds, the work infringes. If the work is produced by imitation or simulation by the hiring of other musicians, or even the same musicians, to perform the copyrighted work in as similar a manner as possible, there is no infringement. See Goldstein v. California, 412 U.S. 546 at 550-51 (1973) (construing non-identical California statute with similar purposes). The legislative history of the 1971 Act indicates that its intent was to put record "pirates" out of business. A "pirate" is one who simply re-records the original work.

It should be clear then that the type of changes involved in this case (or any changes made by the re-recorder) have no bearing on the question of infringement

as posed by §1(f) and its provisos. So long as the allegedly infringing work is a product of re-recording, rather than an independent production, an infringement exists. The dividing line, as I read the statute, is between the re-recorder (even with changes) and the imitator or simulator who stages his own independent production.

Defendants suggested that the copyright doctrine of "substantial similarity" has some applicability to this question. They sought to have the Court include in the instructions a requirement that the jury find substantial similarity before it could find a criminal infringement. The Court disagreed with that contention. The doctrine of substantial similarity is one which the finder of fact in the standard copyright case must find in reaching the conclusion that one work infringes another. In those cases, proof of actual copying is virtually never available. Nimmer, §141.2, fn. 26-27 and accompanying text. Substantial similarity coupled with "access" allows the finder of fact to infer that copying has

taken place. In this case, no such inference or indirect proof is necessary. The testimony of the FBI expert, the testimony of other percipient witnesses and the testimony of Defendant Richard Taxe indicate conclusively that the allegedly infringing works were made by a process of re-recording. Hence, in this case no finding of substantial similarity is necessary. Were one necessary, it would appear that the finding of re-recording, necessary to find a violation of §1(f), would in and of itself be a finding of "fragmented literal similarity". Nimmer, §143.12.

In a civil case, which squarely raised this issue, I would be tempted to stop right here and hold that no finding beyond re-recording under §1(f) is necessary to a finding of infringement. However, in a criminal case, statutes are to be construed narrowly, and this argument by Defendants raises two interesting questions. First, whether the most trivial re-recording (the re-recording of one or two notes) would be an infringement, and second, whether re-recording combined with such comprehensive changes that the

work is no longer recognizable as the original work (i.e., extreme speed changes or running the recording in reverse) would constitute an infringement. Quite obviously, neither of these types of final products are the types which Congress intended to reach in the Sound Recording Amendment. For purposes of this case, the Court did not need to decide whether such works are nevertheless covered by §1(f). The trivial re-recordings might very well be held to be such an insubstantial taking as to not infringe. Nimmer, §143.1 at fn. 62. The comprehensive changes do not fit neatly into any such doctrine but might nevertheless be held to be so far from what Congress intended to prohibit as to not constitute an infringement. In any case, this matter is not raised by the changes involved in this case. The jury instructions in this case required a finding that there be a re-recording of "more than a trivial part of the copyrighted record", and that the final product be "recognizable" as the same performance as recorded in the original. For purposes of this case and in construing this statute in a criminal

context as narrowly as possible, those instructions appear to limit coverage of §1(f) for purposes of this case to its core meaning.

The Clerk shall transmit a copy of this Memorandum Opinion to counsel for Defendants and to the United States Attorney by United States mail.

DATED: August 12, 1974.

/s/ Irving Hill
IRVING HILL, Judge

United States District Court

COURT'S INSTRUCTION ON COPYRIGHT
INFRINGEMENT

(A) STATUTORY PROVISIONS:

Count 1 charges a conspiracy to commit the offense of infringing certain provisions of the copyright law of the United States with respect to sound recordings. Counts 2 through 21, inclusive, charge specific infringements of said copyright law with respect to specific sound recordings. It is, therefore, appropriate to go over with you the relevant and applicable provisions of the copyright law with respect to sound recordings which provisions are involved in this case.

As I told you earlier, prior to February 15, 1972, although the composer of the music and lyrics of a song could copyright those, if that song was performed in a sound recording, the recording was not copyrightable. That was changed by some amendments to the copyright law, passed in late 1971, which became effective February 15, 1972.

Since that time, under the provisions of Title 17 U.S.C. §5, sound recordings may be validly copyrighted if the person

so doing registers his copyright in accordance with all of the requirements of the law and if the fixation date was in accordance with further statutory sections that I will discuss with you.

Among other provisions in the copyright law is a requirement of Title 17 U.S.C. §19 requiring a notice of copyright to be placed upon the copyrighted work. For sound recordings, such notice is prescribed as consisting of the letter "P" in a circle.

Certain copyright infringements, including infringements of valid sound recording copyrights, are made criminal by Title 17 U.S.C. §104, which provides in pertinent part as follows:

"Any person who willfully and for profit shall infringe any copyright secured by this Title . . . shall be [guilty of an offense] against the United States."

Thus, the infringement must be willful and for profit. I will give you more detailed instruction on the elements of the offense of infringement a little later on.

The section of the Copyright Act which is principally in issue in this case is 17 U.S.C., subsection 1(f), which subsection was added in the legislation effective February 15, 1972. Title 17 U.S.C. §1(f) reads as follows:

§1: ". . . any person . . . complying with the provisions of this Title . . . shall have the exclusive right . . .

"(f) To reproduce and distribute to the public . . . reproductions of the copyrighted work if it be a sound recording: Provided, that the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording: Provided further, that this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording . . ."

Let me break that down for you and analyze it, part by part.

The basic language in the beginning of subsection (f) says that one shall have the exclusive right "to reproduce and distribute to the public . . . reproductions of the copyrighted work if it be a sound recording." This provides for the copyrightability of sound recordings and gives to the owner of such copyright one of the normal and usual rights flowing from copyright, i.e., the exclusive right to reproduce and distribute to the public the copyrighted sound recording.

Then comes which I call the first proviso. It reads:

"Provided, that the exclusive right of the owner of a copyright in a sound recording to reproduce it is limited to the right to duplicate the sound recording in a tangible form that directly or indirectly recaptures the actual sounds fixed in the recording."

This says in essence that the exclusive right to reproduce and distribute the sound recording has limitations. It is

limited to the right to duplicate the sound recording in a form that recaptures the actual sounds fixed in the recording.

Next comes the second proviso, which reads:

"Provided further, that this right does not extend to the making or duplication of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording . . ."

The second proviso explains and amplifies the first proviso which, as I have said, limits the exclusive rights granted to copyright holders of sound recordings. The second proviso says in essence that the copyright of sound recordings does not extend to another and different sound recording that is an independent fixation of other sounds, even though such other sounds imitate or simulate those in the copyrighted sound recording. In other words, persons other than the copyright holder, are free to imitate or simulate the copyrighted sound recording if there

is an independent fixation of other sounds. And the holder of the copyright cannot claim his copyright extends to another later performance that even he, himself, may make with the very same artists of the very same work because that later performance would be an independent fixation of other sounds. If he wished to and could meet the other requirements of the law, he could separately copyright his later performance but he could not claim that his earlier copyright covered it.

Let me stop to define certain words right now.

For the purpose of this statute, "imitate" and "simulate" mean the same thing and the word "imitate" is in common use. If you get the same or other musicians to perform a number which had previously been performed, and they now perform it as closely as they could get to the previous performance, it would be an imitation or simulation. What is "infringement?" When someone other than the copyright holder does an act which is the exclusive right of the copyright holder, he infringes.

A valid copyright is a necessary requisite to infringement. A necessary requisite to a valid copyright of a sound recording is the date of fixation. There can be no infringement unless the work infringed had a date of fixation after February 15, 1972. "Date of fixation" means the date on which the work claimed to have been infringed was first embodied in a final master recording from which copies are later made. In this case, we are dealing with tapes on which are many songs. Not every song on every tape is in issue. There can be an infringement of only one song on a tape. The entire tape may be copyrighted but the protection of the copyright, i.e., the exclusive right to reproduction, can be considered as applying separately to the individual songs. If you find as to a given tape which consists of several songs that one or more of such songs had a date of fixation in a master recording on or after February 15, 1972, and that such song was infringed, the infringement is complete and it is irrelevant that other songs on the same tape have dates of fixation before February 15, 1972.

There are in evidence certificates of copyright for each of the tapes in issue. Those certificates are prima facie evidence of the validity of the copyright. They are also prima facie evidence of the date of fixation of each song as disclosed and listed in said certificate. "Prima facie" means evidence upon which an affirmative finding to that effect can be based without any other evidence thereof. Of course, any contrary evidence may be considered as on the question of whether such a finding should be made and the prima facie evidence may itself be disbelieved.

You will remember my discussion of the second proviso. It, too, uses the word "fixation". As I told you, it amplifies and clarifies the limits of the rights held by the copyright holder of sound recordings. The second proviso says that his exclusive right does not extend to the making (and here I quote) "of another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording." (close quote) "Fixation" means the same thing

as I have previously said, embodiment in a master recording. But note that the statutory term is "independent fixation of other sounds." There is an independent fixation of other sounds when there is a new performance, even one which imitates or simulates the previous one. Note the term "other sounds". The statute does not authorize anyone to make a fixation of the same sounds which are the subject of the copyright. A new fixation which involves a re-recording of the copyrighted fixation, even with changes as I will discuss with you soon, is not an independent fixation within the meaning of the second proviso and thus would constitute an infringement.

Let us now talk about changes, since that is one of the major issues of this case. As I previously told you, before February 15, 1972, since a sound recording could not be copyrighted, one could reproduce or copy, identically or with changes, any record or tape already on the market without violating any copyright on that recording. It was necessary only to pay the holder of the copyright on the words and music a royalty

of 2¢ per record.

Under the new law, to determine whether an infringement has occurred, or a conspiracy to infringe has occurred one must examine the accused sound recording and compare it to the copyrighted one. Assuming a valid copyright to exist, to find infringement, you must find that the accused recording duplicates the copyrighted one by recapturing the actual sounds fixed in the copyrighted record. In other words, you must find a re-recording. No infringement would exist if the alleged infringer hired other artists or even the very same artists to perform the very same arrangement and the resultant second recording was indistinguishable from the copyrighted recording, even to a trained ear. There would be no recapturing of the actual sounds in the second recording in such a case. To constitute an infringement, there must be a re-recording of more than a trivial part of the copyrighted recording.

Now, what about changes? An infringement which recaptures the actual sounds by re-recording remains an infringement

-x-

even if the re-recorder makes changes in the speed or tone of the original or adds other sounds or deletes certain frequencies, unless his final product is no longer recognizable as the same performance.

To summarize, to find a willful infringement for profit, as made criminally punishable by 17 U.S.C. §104, the following elements are required to be found:

First, that the sound recording allegedly infringed was validly copyrighted. In order to so find, you must find that the sounds on that recording allegedly infringed had a fixation date of on or after February 15, 1972.

Second, that the Defendant infringed the copyrighted recording as I have defined the arrangement.

Third, that in infringing, the Defendant acted willfully.

Fourth, that the act of infringement by Defendant was for profit.

-xi-

"Profit" includes the sale or exchange of the infringing work for something for value in the hope of some pecuniary gain. It is irrelevant whether the hope of gain was realized or not. The requirement of profit is intended to delineate commercial infringements from infringements for merely personal use and philanthropic infringements.

Supreme Court, U. S.

FILED

DEC 29 1976

MICHAEL RODAK, JR., CLERK

No. 76-497

In the Supreme Court of the United States

OCTOBER TERM, 1976

RICHARD TAXE, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 540 F. 2d 961.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 1976. A petition for rehearing ~~and~~ with a suggestion for rehearing *en banc* was denied on August 23, 1976. The petition for a writ of certiorari was filed on October 8, 1976, and is therefore out of time under Rule 22(2) of Rules of this Court. The jurisdiction of this Court is invoked under 1254(1).

QUESTIONS PRESENTED

1. Whether the Sound Recording Amendment of 1971, 17 U.S.C. (Supp. V) 1 *et seq.*, is unconstitutionally vague on its face or as applied in this case.

(1)

2. Whether the prosecutor's closing argument denied petitioner due process.

3. Whether the district court erred in not holding a hearing on petitioner's challenge to the affidavits underlying four search warrants.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner and three others were convicted of infringing copyrighted sound recordings, willfully and for profit, in violation of 17 U.S.C. (Supp. V) 1(f), 101(e) and 104, and of conspiring to do so, in violation of 18 U.S.C. 371. In addition, petitioner was convicted of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to four years' imprisonment and fines totalling \$26,000, and ordered to pay the costs of his prosecution. The court of appeals affirmed the convictions but vacated and remanded that portion of the judgment imposing costs on petitioner (Pet. App. A).

Petitioner stipulated at trial that, at his direction, record albums and tapes manufactured by major record companies were purchased on the open market and copied onto tapes that were then sold to the general public (Pet. 6). In the copying process slight changes were made in each recording: the speed was increased or decreased, echo effects were produced, and some sounds were eliminated or others were added by use of sophisticated electronic equipment. Petitioner and his co-defendants then promoted the sale of these altered tapes as authentic works, describing them as "Today's hits as done by your favorite artists. Custom simulated by Sound 8 singers and musicians" (*ibid.*; Pet. App. A2).

ARGUMENT

The Sound Recording Amendment to the Copyright Act, 17 U.S.C. (Supp. V) 1 *et seq.*, provides copy-

right protection for sound recordings that are "fixed" after February 15, 1972. The owner of a copyright in a sound recording is granted the exclusive right to "duplicate" the recording, as by records or tapes that "recapture[] the actual sounds fixed in the recording" (17 U.S.C. (Supp. V) 1(f)). That right, however, does not extend "to the making or duplication of *another* sound recording that is an *independent* fixation of *other* sounds, even though such sounds imitate or simulate those in the copyrighted sound recording" (*ibid.*; emphasis added).

The Amendment further provides that the "unauthorized manufacture, use, or sale" of records and tapes that are "copies" of copyrighted musical works "shall constitute an infringement of the copyrighted work" subjecting the infringer to civil liability and, "in a case of willful infringement for profit," to criminal prosecution (17 U.S.C. (Supp. V) 101(e)). Willful infringement for profit carries with it a penalty (in the case of a first offender) of up to one year's imprisonment and a fine of not more than \$25,000 (17 U.S.C. (Supp. V) 104(b)).

1. Petitioner contends (Pet. 9-40) that the law is unconstitutionally vague on its face.

Since First Amendment freedoms are not involved in this case, petitioner's challenge " 'must be examined in the light of the facts of the case at hand' "—that is, as the statute has been applied to his conduct—unless the statute can be said to have "proscribed no comprehensible course of conduct at all." *United States v. Powell*, 423 U.S. 87, 92 (quoting *United States v. Mazurie*, 419 U.S. 544, 550). Both courts below correctly determined that the statute forbids a reasonably ascertainable course of conduct.

First, a "sound recording"—the work subject to copyright protection—is defined as a work "that result[s] from

the fixation of a series of musical, spoken, or other sounds" (17 U.S.C. (Supp. V) 26). The meaning of "fixation" in the context of the statute imports the capture and preservation (on a device such as a record or a tape) of sounds for further perception or communication (see *ibid.*). The copyright owner's exclusive right to "duplicate" (17 U.S.C. (Supp. V) 1(f)) such sound recordings is not (contrary to petitioner's assertion (Pet. 19-20)) unconstitutionally vague simply because the term "duplicate" is not further defined in the statute. Read in context and given its commonsense meaning, the copyright owner's exclusive right to "duplicate" his sound recording conveys upon him the sole power lawfully to reproduce his work, much as the copyright owner of a literary work has the exclusive right to duplicate the subject of his copyright.

Furthermore, the exclusive right of duplication conferred upon the copyright owner—and therefore forbidden to all others during the period of the copyright—derives additional meaning from the limits the statute sets on that right. Thus, individuals other than the copyright owner may with impunity "mak[e] or duplicat[e]" * * * another sound recording that is an independent fixation of other sounds, even though such sounds imitate or simulate those in the copyrighted sound recording" (17 U.S.C. (Supp. V) 1(f)). In simple terms, the statute permits anyone, by efforts that are independent of the copyright owner's, to produce and reproduce "other sounds" than those that appear in the copyrighted work—even if those "other sounds" are intended to be and indeed are quite similar to the ones subject to the statute's protection.

A record or a tape that is not an "independent fixation of other sounds," however, is a "cop[y]" of the copyrighted musical work." Whether the sounds on a particular record or tape constitute a copy of a copyrighted work, or an

independent fixation of other sounds, typically poses issues of similarity for the trier of fact to resolve. See *Ideal Toy Corp. v. Fab-Lu Ltd. (Inc.)*, 360 F.2d 1021 (C.A. 2); *First American Artificial Flowers, Inc. v. Joseph Markovits, Inc.*, 342 F. Supp. 178 (S.D.N.Y.). If the record or tape is found to be a copy, its unauthorized manufacture, use, or sale will constitute infringement (17 U.S.C. (Supp. V) 101(e)).

In short, the statute meaningfully proscribes ascertainable conduct. It cannot be said to "leave[] open * * * the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against" (*United States v. Powell, supra*, 423 U.S. at 92, quoting from *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89). Those who sincerely desire to do so may without undue difficulty conform their conduct to the statute's demands. While there may be cases at the margin where the reach of the statute's prohibition against infringement may cause doubt, that is not reason enough to overcome the presumption of validity that attaches to Acts of Congress (*United States v. National Dairy Products Corp.*, 372 U.S. 29, 32), for "the law is full of instances where a man's fate depends on his estimating rightly" (*Nash v. United States*, 229 U.S. 373, 377).

2. Since the Sound Recording Amendment is not unconstitutionally vague on its face, the question becomes whether, as petitioner also contends (Pet. 40-54), that statute is unconstitutionally vague as applied to this case. We submit that it is not. Petitioner was on notice that the copying and unauthorized use of another's copyrighted work is prohibited. He took the risk, when he re-recorded copyrighted works in their entirety while making only insignificant changes in them, that a jury might find that he had copied the originals within the

meaning of the statute. That the jury so found is hardly surprising, given that the success of petitioner's marketing of the "pirated" recordings was directly dependent on the public's acceptance of his advertisement of "[t]oday's hits as done by your favorite artists."

Petitioner argues (Pet. 44-45) that the statute is unconstitutionally vague as applied to him for an additional reason. He contends that, since the Registrar of Copyrights permits an entire record album to carry a single copyright notice, notwithstanding that some of the bands on that record may contain sound recordings that were fixed prior to the statute's effective date and thus not copyrighted, an individual in petitioner's position is unable to tell from the album alone which sound recordings on an album are protected and which are not.

Conspicuously absent from petitioner's argument is any claim that he has been convicted of infringing any noncopyrighted sound recordings.¹ Indeed, petitioner's argument amounts to the unpersuasive assertion that, since the Registrar of Copyrights has erroneously afforded copyright protection to some sound recordings not entitled to that protection under the statute, it violates due process to convict petitioner of infringing sound recordings that are entitled to and have that protection.

In sum, even assuming that the practice allowed by the Registrar has the effect in some cases of seeming to

¹The government initially charged petitioner with infringing a number of entire albums. When the district court ruled that there could be no infringement of particular "bands" containing sound recordings "fixed" prior to the effective date of the statute, the government limited the infringement charges to individual "bands" that were the subject of valid copyrights (Pet. App. 5). Thus petitioner could not have been found guilty of infringing noncopyrighted works.

grant protection to works not copyrightable,² that cannot make the application of the statute's prohibition in cases where the infringed works are lawfully copyrighted unconstitutional on vagueness grounds.

3. Petitioner next contends (Pet. 55-93) that improper remarks by the prosecutor during closing argument deprived him of a fair trial. The court of appeals gave careful attention to this claim (Pet. App. 7-10). Although it concluded that several of the prosecutor's remarks were "unprofessional," "troublesome," "[un]reasonable," and constituted "misconduct," it also viewed other of the challenged remarks as "permissible," "supported by evidence," and constituting "fair comment" (Pet. App. 8-10). It held that, on balance and given the district court's curative instructions, any error caused by the prosecutor's closing argument was not sufficiently prejudicial to warrant reversal.

The district court was in the best position to gauge the propriety and impact of the prosecutor's argument on the fairness of the trial. The court of appeals closely scrutinized the argument in light of "the facts as a whole" (Pet. App. 9).

²As the court of appeals observed (Pet. App. 4), the statute itself appears to contemplate the practice allowed by the Registrar in providing that "[t]he copyright provided by this title shall protect all the copyrightable component parts of the work copyrighted" (17 U.S.C. 3). Furthermore, as the court also noted (Pet. App. 4-5), anyone wishing to determine whether particular "bands" of a copyrighted album are in fact not subject to the statute's protection may do so by obtaining (for a fee) a copy of the copyright certificate from the Registrar (17 U.S.C. 215). Since the copyright notice on the album gives notice that some, even if not all, of the bands are protected, and since it is relatively simple to determine which bands are or are not protected, it cannot be said that the Registrar's practice makes compliance with the law unconstitutionally difficult.

Those courts were satisfied that due process was not denied, and further review by this Court is not necessary.³

4. Petitioner contends (Pet. 94-103) that the district court erred in refusing to hold a hearing on his challenge to the accuracy of the affidavits underlying four search warrants, pursuant to which many of petitioner's infringing tapes were seized. Petitioner argues, as he did in the district court, that the FBI agent who made the averments in the affidavits wrongfully omitted to state that he and other agents had previously been guided (by petitioner himself) about the premises described in the affidavit and had found no "pirated" tapes, thereby making the averment that such tapes would be found on those premises untruthful.

The court of appeals correctly ruled (Pet. App. 7) that these claims are insubstantial. The omission of any mention of the tour of the premises given by petitioner was immaterial to the question of probable cause. It does not follow, simply because on a tour guided by petitioner himself the agents did not see any "pirated" tapes, either that such tapes were not in fact on the premises (as indeed they turned out to be) or that the agent's statement of his belief that they were present (a belief that was amply confirmed) constituted a deliberate falsehood intending to deceive the magistrate into authorizing a search on less than probable cause. As the court of appeals ruled (Pet. App. 7) "[t]he recording contains no

³There is no need to hold this case pending the decision in *Darden v. Florida*, No. 76-5382, certiorari granted November 1, 1976. In that case a state prosecutor in summation characterized the defendant as an animal who should be kept on a leash (Pet. App. B, p. 750) and repeatedly expressed his wish that the defendant had been killed or mutilated by one of the victims of the crime for which the defendant was on trial. Taken even in their worst light, the comments by the federal prosecutor in the present case are benign in comparison.

substantial showing of falsity."⁴ Petitioner suggests no persuasive reason for further review of this conclusion, and accordingly there is no need in this case to consider what remedy might be appropriate where the affidavit underlying a search warrant does indeed contain a misstatement or a material omission.⁵

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

RICHARD L. THORNBURGH,
Assistant Attorney General.

JEROME M. FEIT,
HENRY WALKER,
Attorneys.

DECEMBER 1976.

⁴In an affidavit filed by the agent in connection with the government's opposition to petitioner's motion to suppress, the agent explained that during the tour of the premises he was not shown the offices, and that he did see large tape reels that he believed to be copies of masters used to produce the illegal tapes, and unlabeled tape cartridges that he believed to be illegal tapes. See the government's brief on appeal, pp. 81-82. Furthermore, the tour did not include a visit to a secret room on the premises, located behind a false bookshelf. See *id.* at 24, 39-40, 83.

⁵The courts of appeals have not adopted a uniform approach to the problem of misstatements in search warrant affidavits, as we discuss in our Brief in Opposition in *Lee v. United States*, No. 75-6969, certiorari denied October 18, 1976, a copy of which we are sending to petitioner's counsel. The different approaches of the several courts of appeals are irrelevant here, where the affidavit did not contain any material omission or any false statement.